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5,2957
No. 14957

United States
Court of Appeals
for the Ninth Circuit

—
EVERT L. HAGAN, Administrator of the Estate
of J. A. Hagan, Deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

—

Transcript of Record

—

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

APR 19 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-6-56

PAUL P. O'BRIEN, CLERK

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Court of Appeals
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Chief Tax Division;

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United States District Court for the Southern
District of California, Central Division

Civil Action No. 17876-WB

EVERT L. HAGAN, Adm. of the Estate of J. A.
Hagan,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains of the United States of America and alleges as follows:

I.

Jurisdiction of this action is conferred by Section 1346(a) (1) of Title 28 of the United States Code.

II.

Plaintiff is the duly qualified and acting administrator of the Estate of J. A. Hagan, and a citizen of the United States and resides at 115 N. Eastern Avenue, Los Angeles County, in the State of California.

III.

This action is one to recover an income tax erroneously and illegally assessed and collected without authority under the Internal Revenue Laws of the United States, pursuant to authority to sue by Section 1346(a) (1) of Title 28 of the United States Code.

IV.

Plaintiff alleges that upon March 15, 1946, J. A. Hagan, doing business as the El Rey Cheese Company made a return for the calendar [2*] year 1945; that said return showed a net income subjecting the said J. A. Hagan to the payment of a tax in the amount of \$592.04, which amount was remitted to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered by J. A. Hagan under the Civil Code of the State of California and doing business at 115 N. Eastern Avenue, Los Angeles 22, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business for J. A. Hagan and that Evert L. Hagan had furnished operating capital to said business in amount in excess of \$50,000. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent tax assessment against Evert L. Hagan for the year 1945 claiming deficiencies in the sum of \$9,276.96, and based the same upon the alleged income of the El Rey Cheese Company.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Plaintiff alleges that Evert L. Hagan in the proper time filed a Petition for redetermination of the tax liability for the year 1945. Plaintiff alleges that a re-audit of all the books, records and original papers of the El Rey Cheese Company for the year 1945 showed that there had been no actual net income to Evert L. Hagan or J. A. Hagan in any amount on account of operations of that company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1945, an agent of the Internal Revenue Bureau checked the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner vs Commissioner of Internal Revenue, Respondent" it was agreed that there was no tax liability upon Evert L. Hagan for the year 1945 on [3] account of net income arising out of the operation of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in disposing of the tax liability of Evert L. Hagan.

Plaintiff alleges that said stipulation and its subsequent adoption by the Tax Court constituted a determination as contemplated under Section 3801 of the Internal Revenue Code; that the effect of the same with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim a tax refund was to allow an adjustment, correction and refund notwithstanding the fact that the ordinary period of limitation for claiming the same had run.

V.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$592.04 plus interest, of the tax paid for the year 1945. A true copy of said claim and of the statement attached thereto is hereto attached marked "Exhibit A" and is made a part of this complaint.

VI.

Said demand for refund has been refused by defendant through its Commissioner of Internal Revenue, in the form of a registered letter dated January 27, 1955, a true copy of which is hereto attached and marked "Exhibit B."

VII.

Plaintiff's claim does not exceed \$10,000 in amount.

And for a Second and Further Cause of Action:

I.

Plaintiff by reference realleges and reavers all of the allegations contained in Paragraphs I, II, III, VI and VII of his first cause of action to the same effect as if they were fully pleaded herein.

II.

Plaintiff alleges that upon March 15, 1947, J. A. Hagan doing business as the El Rey Cheese Company made a return for the calender year 1946; that said return showed a net income subjecting

the said [4] J. A. Hagan to the payment of a tax in the amount of \$3,181.95, which amount was remitted to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered by J. A. Hagan under the Civil Code of the State of California and doing business at 115 N. Eastern Avenue, Los Angeles 22, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business for J. A. Hagan, and that Evert L. Hagan had furnished operating capital to said business in amount in excess of \$50,000.00. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent Tax Assessment against Evert L. Hagan for the year 1946 claiming deficiencies of approximately \$51,000.00, and based the same upon the alleged income of the El Rey Cheese Company. Plaintiff alleges that Evert L. Hagan in the proper time filed a Petition for redetermination of the tax liability for the year 1946. Plaintiff alleges that a re-audit of all the books, records and original papers of the El Rey Cheese Company for the year 1946 showed that there had been no actual net income

in any amount on account of operations of that company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1946, an agent of the Internal Revenue Bureau checked the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner, vs Commissioner of Internal Revenue, Respondent" it was agreed that there was no tax liability upon Evert L. Hagan for the year 1946 on account of net income arising out of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in disposing of the tax [5] liability of Evert L. Hagan.

Plaintiff alleges that said stipulation and its subsequent adoption by the Tax Court constituted a determination as contemplated under section 3801 of the Internal Revenue Code; that the effect of the same with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim a tax refund was to allow an adjustment, correction and refund notwithstanding the fact that the ordinary period of limitation for claiming the same had run.

III.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$3,181.95 plus interest, of the tax paid for the year 1946. A true copy of said claim and of the statement attached thereto is hereto attached, marked "Exhibit C" and is made a part of this Complaint.

Wherefore, plaintiff prays as follows:

(1) For judgment in the amount of \$592.04 plus interest, on account of the wrongful payment of income taxes for the year 1945; and,

(2) For judgment in the amount of \$3,181.95, plus interest, on account of the wrongful payment of income taxes for the year 1946; and,

(3) For the costs in this action incurred; and,

(4) For such other and further orders as the court may deem proper.

/s/ EVERT L. HAGAN,

Administrator of the Estate of
J. A. Hagan, in Pro Per.

State of California,
County of Los Angeles—ss.

Evert L. Hagan, first being duly sworn, states: That he is the plaintiff in the above-entitled action; that he has read the complaint and is acquainted with its contents and knows of his own knowledge that the facts therein stated are true and correct.

/s/ EVERT L. HAGAN.

Subscribed and sworn to before me this 15th day of February, 1955.

/s/ Indistinguishable],

Notary Public in Said County
and State.

My Commission expires March 15th, 1957. [6]

Exhibit A

Form 843

U. S. Treasury Department

Internal Revenue Service

Claim

To be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: [Blank.]

The Collector will indicate in the block below
the kind of claim filed, and fill in, where required,
the certificate on the back of this form.

☐ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Evert
L. Hagan, as Administrator of the estate of
James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue, Los Angeles
22, California.

City, postal zone number, and State:.....

1. District in which return (if any) was filed:
Phoenix, Arizona.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1945, to Dec. 31, 1945.

3. Kind of tax: Income tax.

4. Amount of assessment, \$.; dates of payment: Quarterly thru 1945 & Mar. 15, 1946.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$592.04.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business reveals that said payment was in error in that said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan but rather to Evert L. Hagan. In view of the above facts, the said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this claim (including any accompanying schedules and

statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19...

/s/,

Administrator of the Estate of
James A. Hagan, Deceased.

Exhibit B

U. S. Treasury Department
Office of the Director of Internal Revenue
140 W. Monroe Street Building
Phoenix Arizona

In replying to:

C:A:C:MM:Ba

Jan. 27, 1955.

Estate of James A. Hagan, Dec'd.,
Evert L. Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Claims for Refund of Income Tax for Years 1945
& 1946.

This letter refers to your claims for refund of income tax in the amount of \$592.04 for 1945 and \$3,181.95 for 1946.

In accordance with the provisions of section 3772(a) (2) of the Internal Revenue Code this

notice of disallowance in full of your claim is hereby given by registered mail.

By direction of the Commissioner:

WILSON B. WOOD,
District Director. [8]

Exhibit "C"

Form 843

U. S. Treasury Department
Internal Revenue Service
(Revised June, 1951)

Claim

To be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: [Blank.]

The Collector will indicate in the block below the kind of claim filed, and fill in where required, the certificate on the back of this form.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Evert L. Hagan, as Administrator of the estate of James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue.

City, postal zone number, and State: Los Angeles 22, California.

1. District in which return (if any) was filed: Phoenix, Arizona.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1946, to Dec. 31, 1946.

3. Kind of tax: Income Tax.

4. Amount of assessment, \$.; dates of payment: Quarterly thru 1946 & Mar. 15, 1947.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$3,181.95.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan, but rather to Evert L. Hagan: In view of the above facts said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this

claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19..,

/s/,

Administrator of the Estate of
James A. Hagan, Deceased.

[Endorsed]: Filed Feb. 16, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: The Plaintiff, Evert L. Hagan in Pro Per.:

You Will Please Take Notice, that on Monday, May 23, 1955, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in Courtroom No. 4, before the Honorable William Byrne, in the Post Office and Court House Building, 312 N. Spring Street, Los Angeles 12, California, defendant United States of America, by and through its attorneys herein mentioned, will make a motion to dismiss the above action, with prejudice, as detailed in its Motion to Dismiss.

Dated: May 13, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,

Assistant U. S. Attorneys;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant. [10]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant moves the Court to dismiss this action on the grounds (A) that this Court lacks jurisdiction over the subject matter, and (B) that the complaint fails to state a claim upon which relief can be granted. The reasons relied upon are as follows:

1. Under Section 7422(a) of the Internal Revenue Code of 1954, no proceeding may be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been duly filed.

2. Section 322(b) of the Internal Revenue Code of 1939 which is here applicable to the question of filing of claims for refund (other than claims under Section 3801 of the Internal Revenue Code of 1939) provides that for a claim to be duly filed it must have been filed by the taxpayer within three years from the time the return was filed or within two years from the time the tax was paid. [11]

3. Paragraph V of the First Cause of Action in the complaint and paragraph III of the Second

Cause of action in the complaint allege the filing of claims for refund for the taxable years 1945 and 1946, respectively, on September 6, 1952.

4. The complaint does not allege the filing of returns for 1945 and 1946 within the three period prior to September 6, 1952, nor the payment of any tax for those years within the two year period prior to that date nor the filing of any agreement or agreements to extend the time limits contained in the applicable provisions of Section 322 of the Internal Revenue Code of 1939.

5. In addition, paragraph IV of the First Cause of Action in the complaint and paragraph II of the Second Cause of Action in the complaint allege a right of recovery under the provisions of Section 3801 of the Internal Revenue Code of 1939.

6. Section 3801(c) of the Internal Revenue Code of 1939 provides that any refund under Section 3801 shall only be made where a claim for refund thereunder has been made within one year following the determination relied upon.

7. Not only does the complaint fail to allege the date of the determination relied upon but completely fails to allege the filing of any claims for refund under Section 3801(c.)

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,

Asst. United States Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 13, 1955. [12]

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard on May 23, 1955, on the motion of the defendant, United States of America, to dismiss the complaint in the above-entitled cause with prejudice, on the grounds (A) that this Court lacks jurisdiction over the subject matter, and (B) that the complaint fails to state a claim upon which relief can be granted, and it appearing to the Court that said motion should be granted,

It Is Ordered that said motion to dismiss the complaint be granted and that the plaintiff, Evert L. Hagan, Administrator of the Estate of J. A. Hagan, may have leave to amend his complaint within 20 days from the date of this order.

Dated: This 2nd day of June, 1955.

/s/ WM. M. BYRNE,
Judge.

Presented by:

/s/ BRUCE I. HOCHMAN,

Assistant United States At-
torney.

Affidavit of Service by Mail.

Lodged May 24, 1955.

[Endorsed]: Filed May 24, 1955. [16]

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

Plaintiff complains of the United States of America and alleges as follows:

I.

Jurisdiction of this action is conferred by Section 1346(a) (1) of Title 28 of the United States Code.

II.

Plaintiff is the duly qualified and acting administrator of the Estate of J. A. Hagan, and a citizen of the United States and resides at 115 N. Eastern Avenue, Los Angeles County, in the State of California.

III.

This action is one to recover an income tax erroneously and illegally assessed and collected without authority under the Internal Revenue Laws of the United States, pursuant to authority to sue by

Section 1346(a) (1) of Title 28 of the United States Code. [18]

IV.

Plaintiff alleges that upon March 15, 1946, J. A. Hagan, doing business as the El Rey Cheese Company made a return for the calender year 1945 for Federal Income Tax; that said return showed a net income subjecting the said J. A. Hagan to the payment of a tax in the amount of \$592.04 which amount was remitted along with the return to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered by J. A. Hagan under the Civil Code of the State of California and doing business at 115 N. Eastern Avenue, Los Angeles, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business for J. A. Hagan and that Evert L. Hagan had furnished operating capital to said business in an amount in excess of \$50,000.00. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by viture of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan, his brother, in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent Tax Assessment against Evert L. Hagan for the year 1945 claiming deficiencies in

the sum of \$9,276.96, and based the same upon the alleged net income of the El Rey Cheese Company. Plaintiff alleges that Evert L. Hagan in the proper time filed a Petition in the United States Tax Court for redetermination of the tax liability for the year 1945. Plaintiff alleges that a re-audit of all the books, records and original papers of the El Rey Cheese Company for the year 1945 there was no actual net income to Evert L. Hagan or J. A. Hagan in any amount on account of the operations of the company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1945, an agent of the [19] Internal Revenue Bureau checked the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner, vs. Commissioner of Internal Revenue, Respondent" it was agreed there was no tax liability upon Evert L. Hagan for the year 1945 on account of the net income arising out of the operation of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in entering its decision disposing of the case and determining that there was no tax liability upon Evert L. Hagan upon January 19th, 1953.

Plaintiff alleges that said stipulation and the decision of the Tax Court constituted a determination such as contemplated under Section 3801 of the Internal Revenue Code; that the effect of the same with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim a refund was to

allow for an adjustment, correction and refund notwithstanding the fact that the ordinary period limitation for claiming had run.

V.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$592.04 plus interest, of the tax paid for the year 1945. A true copy said claim and of the statement attached thereto is hereto attached and marked "Exhibit A" and is by reference made a part of this complaint; that after the determination of the Tax Court January 19, 1953, in December of 1953, the representatives of the defendant corresponded with the plaintiff and indicated they were going to reject the claim; that thereafter on December 10, 1953, plaintiff still insisting upon his right to refund called the representatives of the defendant's attention to to determination of the Tax Court; that thereafter in the months of April and May, 1954, there were conferences and correspondence following up the contention of the plaintiff that the determination of the Tax Court constituted a determination under Section 3801 of the I.R.C. Plaintiff hereto attaches all of said correspondence and by reference incorporates it in this Complaint as Exhibit "B." [20]

Plaintiff alleges that the correspondence and conferences which were initiated in December, 1953, constituted informal claim for refund under Section 3801 of the I.R.C., and that the representatives of

the defendant accepted them as such and dealt with the claim made in this manner the same as if it had been formally presented, and they purported to rule upon the merits of the claims and did not reject the claim because of the form in which it was presented.

VI.

Said demand for refund has been refused by the defendant through its Commissioner of Internal Revenue, in the form of a resgistered letter dated January 27, 1955, a true copy of which is attached hereto and incorporated herein, and is marked Exhibit "C."

VIII.

Plaintiff's claim does not exceed \$10,000.00 in amount.

And for a Second and Further Cause of Action:

I.

Plaintiff by reference realleges and reavers all of the allegations contained in Paragraphs I, II, III, VI and VII of his first cause of action to the same effect as if they were fully pleaded herein.

II.

Plaintiff alleges that upon March 15, 1947, J. A. Hagan doing business as the El Rey Cheese Company made a return for the calender year 1946; that said return showed a net income subjecting the said J. A. Hagan to the payment of an income tax in the amount of \$3,181.95, which amount was re-

mitted with the return to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered to J. A. Hagan under the Civil Code of the State of California, and doing business at 115 N. Eastern Avenue, Los Angeles, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business [21] for J. A. Hagan, and that Evert L. Hagan had furnished operating capital to said business in an amount in excess of \$50,000.00. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan, his brother, in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent Tax Assessment against Evert L. Hagan for the year 1946 claiming deficiencies of approximately \$51,000.00, and based the same upon the alleged net income of the El Rey Cheese Company. Plaintiff alleges that Evert L. Hagan within the proper time filed a Petition in the United States Tax Court for a redetermination of the tax liability for the year 1946. Plaintiff alleges that a re-audit of all the books, records, and original papers of the El Rey Cheese Company for the year 1946 showed there was no actual net income in any amount on account

of the operations of the El Rey Cheese Company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1946, an agent of the Internal Revenue Bureau check the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner, vs. Commissioner of Internal Revenue, Respondent," it was stipulated there was no tax liability upon Evert L. Hagan for the year 1946 on account of the net income arising out of the operations of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in entering its decision disposing of the case and determining that there was no tax liability on Evert L. Hagan upon January 19, 1953.

Plaintiff alleges that said stipulation and the subsequent decision of the Tax Court adopting it constituted a determination as contemplated under Section 3801 of the I.R.C.; that the effect [22] with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim the tax refund herein involved was to allow an adjustment, correction and refund notwithstanding the fact that the ordinary period of claiming the same had run.

III.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$3,181.95 plus interest, of the tax paid for the year 1946. A true copy of said claim and the statement attached thereto is hereto attached

and incorporated herein, marked Exhibit "D"; that after the determination of the Tax January 19, 1953, the representatives of the defendant corresponded with the plaintiff and indicated they were going to reject the claim; that thereafter on December 10, 1953, plaintiff answered said correspondence and called their attention to the decision of the Tax Court; that thereafter in the months of April and May, 1954, the plaintiff conferred with representatives of the defendant and corresponded with them following up the contention of the plaintiff that the determination of the Tax Court constituted a determination under Section 3801 I.R.C. Plaintiff hereto attaches all of said correspondence and by reference incorporates it in this Complaint as Exhibit "B."

Plaintiff alleges that the correspondence and conferences which were initiated in December, 1953, constituted an informal claim for refund under Section 3801 of the I.R.C., and that the representatives of the defendant accepted them as such and dealt with the claim made in this manner the same as if it had been formally presented, and they purported to rule upon the merits of the claim and did not reject it because of the form in which it was presented.

IV.

Said demand for refund has been refused by the defendant through its Commissioner of Internal Revenue, in the form of a registered letter dated January 27, 1955, a true copy of which [23] is

hereto attached and incorporated in this Complaint marked Exhibit "C."

Wherefore, plaintiff prays as follows:

(1) For a judgment in the amount of \$592.04 plus interest, on account of the wrongful payment of income taxes for the year 1945; and,

(2) For a judgment in the amount of \$3,181.95, plus interest, on account of the wrongful payment of income taxes for the year 1946; and,

(3) For the costs in this action incurred; and,

(4) For such other and further orders as this court may deem proper.

/s/ JESSE A. HAMILTON,

Attorney for the Plaintiff.

State of California,

County of Los Angeles—ss.

Evert L. Hagan, first being duly sworn deposes and says: That he is the plaintiff in the above-entitled action; that he has read the Complaint and is acquainted with its contents, and knows that the facts therein stated are true and correct.

/s/ EVERT L. HAGAN.

Subscribed and sworn to before me this day of June, 1955.

[Seal] /s/ JESSE A. HAMILTON,

Notary Public in Said County
and State.

My Commission expires July 28, 1955. [24]

Exhibit A

Claim

Name of taxpayer or purchaser of stamps: Evert L. Hagan, as Administrator of the estate of James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue, Los Angeles 22, California.

City, postal zone number, and State

1. District in which return (if any) was filed: Phoenix, Arizona.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1945, to Dec. 31, 1945.

3. Kind of tax: Income Tax.

4. Amount of assessment, \$.....; dates of payment Quarterly thru 1945 & Mar. 15, 1946.

5. Date stamps were purchased from the Government.

6. Amount to be refunded: \$592.04.

7. Amount to be abated (not applicable to income, estate, or gift taxes).

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business reveals that said

payment was in error in that said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan but rather to Evert L. Hagan. In view of the above facts, the said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19...

/s/,

Administrator of the Estate of
James A. Hagan, Deceased.

Exhibit "B"

District Director of Internal Revenue
Audit Division
1031 South Broadway, Room 233
Los Angeles 15, California

12/1/53.

Mr. Evert L. Hagan,
115 N. Eastern Ave.,
Los Angeles 22, Calif.

Enclosed are Claim Withdrawal Forms for your signature.

A. S. ALLEN, IRA,
PR 4711, 1056. [26]

Dec. 10, 1953.

Mr. A. S. Allen,
Audit Division,
1031 So. Broadway,
Los Angeles, Calif.

Re: Claim for Refund, Estate of
J. A. Hagan 1945 & 1946.

Dear Sir:

Answering yours of 12/1/53 requesting that I sign a claim withdrawal form in the above-referred claims, I must refuse to do so.

You no doubt aware, or can become aware, that the government by stipulation agreed to a decision that has been entered by the United States Tax Court in Docket #27441 adjudged that I was not

Exhibit "B"

(Continued)

personally liable for any taxes for these years. My brother's liability as associate or partner could be no greater than mine. Therefore if I owed nothing then he overpaid. This decision was entered January 19th this year.

Please reconsider the claims in the light of this additional fact.

Yours truly,

EVERT L. HAGAN. [27]

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

April 19, 1954.

In Replying refer to

Ap: LA: AS-AWM

Mr. Everet Leo Hagan,
115 North Eastern Avenue,
Los Angeles 22, California.

Dear Mr. Hagan:

Subject: Estate of James A. Hagan, Deceased,
Evert Leo Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Exhibit "B"

(Continued)

The administrative file in the above-described case has been referred to this office for consideration pursuant to your request filed with the office of the District Director of Internal Revenue at Los Angeles, California.

In response to your request a conference has been arranged for 10 a.m., April 23, 1954, to be held at 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles, California. At this conference you will be afforded an opportunity to present, in an informal manner, the facts, arguments or legal authority in support of your contentions. If practicable, any additional matter not previously submitted should be filed with the Appellate Division at least three days prior to the conference.

If for any reason, you will be unable to appear for conference on the date fixed above, please advise this office immediately upon receipt of this letter, stating the nearest date or dates on which you will be able to appear. In your reply please refer to the symbols Ap:LA:AS-AWM.

In the event you are represented by an attorney it is essential that proper power of attorney be filed with the office of the District Director of Internal Revenue or this office at or prior to the conference.

Exhibit "B"
(Continued)

Very truly yours,

JOSEPH B. HARLACHER,
Assistant Regional
Commissioner, Appellate.

By,
Associate Chief,
Appellate Division. [28]

May 17, 1954.

U. S. Treasury Bureau,
Internal Revenue Service,
Regional Commissioner,
1250 Subway Terminal Bldg.,
4175 S. Hill St.,
Los Angeles 13, Calif.

In Re: Ap:LA:AS-AWM

Subject: Estate of James A. Hagan, Deceased,
Evert L. Hagan, Administrator,
115 N. Eastern Ave.,
Los Angeles 22, Calif.

Attention: Mr. Mitchell, Appellate Division.

Gentlemen:

Pursuant to our conference of April 23rd, 1954,
I have had my attorney look into the question of

Exhibit "B"

(Continued)

whether or not the statute of limitations acted as a bar to the above-described claim. After somewhat conclusive study it is his opinion that the bar of the Statute of Limitations is removed by the effect of Section 3801 Internal Revenue Code. The facts will show that though no formal partnership had been entered into between myself and J. A. Hagan in the operation of the El Rey Cheese Company that in effect it was a family partnership, and other courts have on a full review of the facts in effect so held. This being so the effect of the determination with regard to my tax liability during the years 1945 and 1946 when this relationship existed would have the effect of allowing for an adjustment in face of the regular Statute of Limitations.

I believe you must be acquainted with Mertens "Law of Federal Income Taxation." To substantiate my position I quote from this Treatise upon the subject.

Vol. 2, page 396:

"The Internal Revenue Code contains a new provision, first introduced by the 1938 Act, of major importance in the ascertainment of tax liability not only for years covered by the 1938 Act and the Code but also prior years. It provides that in the inclusion of income or in taking a deduction on the determination of basis in a prior year, such error

Exhibit "B"

(Continued)

may be corrected notwithstanding that the ordinary period of limitations has run."

Page 410:

"The statute permits adjustment of the tax for prior or subsequent years in five cases and those only:

"(1) When a determination requires the inclusion in gross income of that which was erroneously included in the 'gross income' of a taxpayer for another taxable year. [29]

"(2) * * *

"(3) When a 'determination' requires the exclusion from gross income of an item with respect to which a tax was paid (for the current year) and which was erroneously excluded or omitted from the gross income of the tax payer for another taxable year."

Page 413:

"It has been previously indicated that one of the types of determinations permitting an adjustment under this Section (type 1) is the inclusion in gross income of an item which was erroneously included in the gross income of the tax payer for another taxable year or in the gross income of a related tax payer. Two examples as to the application of this provision are given in the regulation as follows:

Exhibit "B"

(Continued)

"Example (1): A taxpayer who keeps his books on the cash basis erroneously included in his return for 1933 an item of accrued rent. In 1938, after the period of limitations on refunds for 1933 has expired, the Commission discovered that the tax payer received his rent in 1934 and asserts a deficiency for 1934, which was sustained by the Board of Tax Appeals in 1941. An adjustment was authorized with respect to the year 1933. If the tax payer had returned the rent for both 1933 and 1934 and by a determination was denied a refund claimed for 1934 on account of the rent item, a similar adjustment is authorized.

"Example (3): A husband assigned to his wife salary to be earned by him in the year 1936. The wife included such salary in her separate return for that year and the husband omitted it. The commissioner asserted a deficiency against the wife for 1936 with respect to a different item of income and she contested that deficiency before the Board of Appeals. The wife would therefore be barred by Section 322(C) of the Rev. Act of 1936. Thereafter, the Commissioner asserts a deficiency against the husband on account of the omission of such salary from his return for 1936. The husband unsuccessfully contests the deficiency before the Board of Tax Appeals. An adjustment is authorized with respect to the wife's tax for 1936."

Exhibit "B"

(Continued)

Page 425:

"A 'determination' upon which the operation of these provisions may be predicated may take the form of a decision of the Tax Court.

"It has been suggested that cases which are closed on the basis of a stipulation giving effect to settlement agreements while pending before the Board will be included among the judgments considered to be a determination for this purpose." 27 Cal. L.R. 109 (1939).

Page 426:

"A determination may take the form of a final disposition of the claim for refund. Such disposition, the regulations indicate, may result in a determination with respect to two classes of items, i.e., items included by the tax payer in a claim for refund and items applied by the Commissioner to offset the alleged overpayment * * *"

Page 428:

"The statute requires that in applying the provisions dealing with adjustments a 'related tax payer' be treated as the tax payer. The effect of the merger of the two indentities is to permit an adjustment in the case of the tax payer with respect to whom the error was [30] made although the determination was made with respect to a different tax payer. A related 'tax payer' is one who stands

Exhibit "B"

(Continued)

in a certain relationship to the taxpayer. These relationships are set forth in the statute as follows: 'A taxpayer who with the taxpayer with respect to whom a determination specified is made, stood in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance or disallowance therein referred to was made, in one of the following relationships: (a) husband and wife, (b) grantor and fiduciary, (c) grantor and beneficiary, (d) fiduciary and beneficiary, legatee or heir, (e) decedent and decedent's estate or partner.'

Page 430:

"One of the essential conditions precedent to the operations of these provisions is inconsistency of position, whether on the tax payer or the government, which operates adversely to the interests of the other party; in other words, the inconsistent position referred to is one maintained by the person other than the one entitled to the adjustment of the item in question, neither party can by his own conduct bring the statute into operation for his own benefit.

"For example, an adjustment which would result in additional assessment is authorized only if the taxpayer with respect to whom the determination is made has, in connection therewith, maintained a position which is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallow-

Exhibit "B"

(Continued)

ance, recognition or non-recognition, as the case may be, and such inconsistent position is adopted in the determination. An adjustment which would result in an additional assessment for some other year is not authorized if the Commissioner, and not the taxpayer, has maintained such inconsistent position."

Page 432:

"The application of these provisions in the case of related taxpayers is considerably circumscribed by the additional limitation that no adjustment by way of a deficiency assessment may be made against a related taxpayer unless the relationship existed both the taxable year with respect to which the error was made and at the time the taxpayer, with respect to whom determination is made, first maintained the inconsistent position as to the item with respect to the taxable year to which the determination relates. In general this means that when an inconsistent position is maintained in a return, claim for refund, or petition to the Board of Tax Appeals, for the taxable year in respect of which the determination is made, the requisite relationship must exist on the date of filing such document. The limitation does not apply if the adjustment would be made as if it were an ordinary overpayment, as that item is used in the Internal Revenue Code, and it is sufficient in such cases that the

Exhibit "B"

(Continued)

requisite relationship existed during the year the error is made."

See also 66 Harvard Law Review 225 (1952):

From the above as applied to the facts in my case as executor of the estate of J. A. Hagan it certainly appears (a) that there was a determination. And there was the maintenance in said determination of an inconsistent position as regards to the tax liability of the El Rey Cheese Company which varied from the liability assumed by J. A. Hagan when he paid the taxes that are now asked to be refunded. Therefore the government cannot under the provisions of Section 3801 of the Internal Revenue Code equitably assert the regular statute of limitations, and the matter should be open for adjustment and the refund should be granted.

I await your action upon this matter.

Yours very truly,

.....,
EVERT L. HAGAN. [31]

Exhibit "B"

(Continued)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

May 20, 1954.

In replying refer to
Ap:LA:AS-AWM

Estate of James A. Hagan, Deceased,
Evert L. Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Dear Mr. Hagan:

Subject: Claim for Refund—Estate of James
A. Hagan, Deceased.
Income Tax—Years 1945 and 1946.

This is in reply to your letter of May 17, 1954, whereby you contend that claims of the above taxpayer for the years 1945 and 1946 be allowed by reason that there has been a "determination under the income tax laws," namely, a decision by The Tax Court of the United States in the case of Evert L. Hagan, upon which the operation of the provisions of Section 3801 may be predicated.

Code Section 3801 provides for the mitigation of the statute of limitations in certain cases where, by

Exhibit "B"

(Continued)

virtue of a determination involving a particular year of a particular taxpayer, a correlative adjustment should be made for another year or for a related taxpayer.

The Tax Court, in its decision in the case of Evert Leo Hagan, Docket No. 27441, ordered and decided "That there are no deficiencies in income taxes or penalties due from, or overpayment due to, petitioner for the taxable years 1945 and 1946."

Your attention is called to the fact that by the decision of The Tax Court a "determination was made that 1945 and 1946 returns of Evert Leo Hagan were accepted as filed. There was no finding that an inconsistent position had been taken by either Evert L. Hagan, or the Commissioner.

Therefore, the "determination" does not meet the requirements of Code Section 3801(b), "circumstances of Adjustment."

Very truly yours,

JOSEPH B. HARLACHER,
Assistant Regional
Commissioner, Appellate.

By
Associate Chief,
Appellate Division. [32]

Exhibit "C"

U. S. Treasury Department
Office of the Director of Internal Revenue
140 W. Monroe Street Building
Phoenix, Arizona

In replying refer to:

C:A:C:MM:ba

Jan. 27, 1955.

Estate of James A. Hagan, Dec'd.,
Evert L. Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Claims for Refund of Income Tax for Years 1945
& 1946.

This letter refers to your claims for refund of
income tax in the amount of \$592.04 for 1945 and
\$3,181.95 for 1946.

In accordance with the provisions of section
3772(a)(2) of the Internal Revenue Code this no-
tice of disallowance in full of your claim is hereby
given by registered mail.

By direction of the Commissioner:

WILSON B. WOOD,
District Director. [33]

Exhibit D

Claim

Name of taxpayer or purchaser of stamps: Evert L. Hagan, as Administrator of the estate of James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue, Los Angeles 22, California.

City, postal zone number, and State

1. District in which return (if any) was filed: Phoenix, Arizona.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1946, to Dec. 31, 1947.

3. Kind of tax: Income Tax.

4. Amount of assessment, \$.....; dates of payment Quarterly thru 1946 & Mar. 15, 1947.

5. Date stamps were purchased from the Government.

6. Amount to be refunded: \$3,181.95.

7. Amount to be abated (not applicable to income, estate, or gift taxes).

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business reveals that

said payment was in error in that said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan but rather to Evert L. Hagan. In view of the above facts, the said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19...

/s/,

Administrator of the Estate of
James A. Hagan, Deceased.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1955. [34]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS FIRST
AMENDED COMPLAINT AND NOTICE
OF MOTION FOR MORE DEFINITE
STATEMENT

To: The Plaintiff, Evert L. Hagan, Administrator
of the Estate of J. A. Hagan, and His Counsel
Jesse A. Hamilton:

You Will Please Take Notice, that on Monday,
July 18, 1955, at 9:45 a.m., or as soon thereafter as
counsel can be heard, in Courtroom No. 4, before
the Honorable William Byrne, in the Post Office
and Courthouse Building, 312 N. Spring Street, Los
Angeles 12, California, defendant United States of
America, by and through its attorneys herein men-
tioned, will make a motion to dismiss the Frist
Amended Complaint with prejudice as detailed in
its Motion to Dismiss in the alternative for a more
definite statement.

Dated: June 30, 1955.

LAUGHLIN E. WATERS,

U. S. Attorney;

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief,
Tax Division;

ROBERT H. WYSHAK, and

BRUCE I. HOCHMAN,

Asst. U. S. Attorneys;

/s/ BRUCE I. HOCHMAN,

Attorneys for Defendant. [36]

[Title of District Court and Cause.]

MOTION TO DISMISS FIRST AMENDED
COMPLAINT AND MOTION FOR A MORE
DEFINITE STATEMENT

The defendant incorporates by reference the Motion to Dismiss the complaint filed on May 13, 1955. The Motion to Dismiss the complaint and Memorandum of Points and Authority in Support of Motion to Dismiss are deemed to be incorporated by reference in this present Motion to Dismiss the First Amended Complaint. In the alternative the defendant moves the Court to require the plaintiff to make his complaint more definite and certain regarding the following aspects:

(1) The complaint is indefinite and uncertain in that it does not state when and where and by what authority the plaintiff qualifies and acts as the administrator of the Estate of J. A. Hagan.

(2) The complaint is indefinite, vague and uncertain in that it does not state whether the plaintiff, if duly qualified in acting as the administrator of the Estate of J. A. Hagan, has the requisite, authority and power to bring this action. [37]

Dated: June 30, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Assistant U. S. Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant. [38]

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 30, 1955. [39]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 21, 1955

Present: Hon. W. M. Byrne, District Judge.

Proceedings:

It Is Ordered that motion to dismiss is granted with 20 days leave to amend.

Counsel for defendant is directed to prepare, serve, and lodge formal order pursuant to Local Rule 7.

Counsel notified.

JOHN A. CHILDRESS,
Clerk.

By SEITZ,
Deputy Clerk. [41]

United States District Court for the Southern
District of California, Central Division

No. 17876-WB Civil

EVERT L. HAGAN, Administrator of the Estate
of J. A. Hagan,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard on July 18, 1955, on the motion of the defendant, United States of America, to dismiss the First Amended Complaint in the above-entitled cause with prejudice, on the grounds (A) that this Court lacks jurisdiction over the subject matter and (B) that the complaint fails to state a claim upon which relief can be granted; the plaintiff having consented to the granting of this motion by not filing memorandum in opposition in accordance with Local Rule 3(d), and by not appearing at the hearing to oppose the motion, and it appearing to the Court that said motion should be granted,

It Is Ordered that said motion to dismiss the First Amended Complaint be granted and that the plaintiff, Evert L. Hagan, Administrator of the Estate of J. A. Hagan, may have leave to amend his

complaint within 20 days from the date of this [42] order.

Dated: This 10th day of August, 1955.

/s/ WM. M. BYRNE,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1955. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States of America, and Laughlin Waters, United States Attorney:

You and Each of You Take Notice, that the Plaintiff does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of the above-entitled Court in the above-entitled Action dismissing the first Amended Complaint filed herein upon the Motion to Dismiss filed herein by the Defendant.

Dated: August 29th, 1955.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff. [45]

State of California,
County of Los Angeles—ss.

Evert L. Hagan, first being duly sworn deposes and says: That he is the Plaintiff in the above-entitled action, and the party who is taking the appeal

in the action; that the appeal is not taken for vexation and delay but because this affiant has been advised by his attorney that the appeal has merit; that the appeal is taken in good faith by this affiant in order to obtain an adjudication of his legal rights from the United States Court of Appeals.

/s/ EVERT L. HAGAN.

Subscribed and sworn to before me this 29th day of August.

[Seal] /s/ Illegible,

Notary Public in Said County
and State.

My commission expires March 15, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1955. [46]

[Title of District Court and Cause.]

STATEMENT OF POINT ON APPEAL

The only contention Plaintiff makes upon this Appeal is that the First Amended Complaint stated a valid and good Claim for Relief or Cause of Action. Briefly the whole matter resolves itself to the answer of this question:

Where during the years 1945 and 1946 two brothers have in fact been engaged in a partnership business, and one of the brothers makes an individual tax return for supposed profits from the busi-

ness for the years 1945 and 1946 showing himself to be subject to taxes and makes a payment of these taxes, and where the Commissioner of Internal Revenue then proceeds to make a deficiency assessment against the other brother for these years, and the matter of the deficiency assessment is by Petition taken to the U. S. Tax Court for redetermination of the tax liability for these years, and where a re-audit of the partnership books showed there were actually no net profit for these years, and where the Tax Court case was settled by a stipulation, later adopted as the decision of the Tax Court in the matter, to the effect [48] that there were no taxes due from the brother (who had made no return from these years), and where the estate of the first brother, who had made the erroneous payments, within the time allowed by Section 3801 of the Internal Revenue Code made an informal claim for refund and adjustment, which claim was not rejected because of the form in which it was presented, will not the provisions of Section 3801 I.R.C. extend the statute of limitations for filing of claims so that the estate of the brother-partner may claim benefit of the "determination" of the Tax Court, and be allowed to claim a refund of the taxes erroneously paid for the years 1945 and 1946?

Dated: Aug. 29th, 1955.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 30, 1955. [49]

[Title of District Court and Cause.]

REQUEST AND DESIGNATION OF PORTIONS OF THE RECORD FOR APPEAL

The Plaintiff, Evert L. Hagan, having filed Notice of Appeal from the Order of Dismissal of the First Amended Complaint in the above-entitled action, hereby requests that the Clerk of the above-entitled Court prepare and certify the following portions of the record as the record on appeal and transmit a true copy of the following to the United States Court of Appeals for the Ninth Circuit:

1. The First Amended Complaint.
2. The Motion to Dismiss the First Amended Complaint.
3. The Minute Order of the Court granting the Motion to Dismiss the First Amended Complaint.
4. The Judgment, if any is entered, made pursuant to said order dismissing the First Amended Complaint.
5. Notice of Appeal.
6. Cost Bond on Appeal.
- 6a. Statement of Point on Appeal.
7. Designation of portions of the record on appeal.

Dated: Aug. 29th, 1955.

/s/ JESSE A. HAMILTON,
Attorney for the Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1955. [51]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL AS RE-
QUIRED BY RULE 73(C), FEDERAL
RULES OF CIVIL PROCEDURE

Whereas, Evert L. Hagan, the plaintiff in the above-entitled action desires to give an undertaking to secure the payment of costs upon appeal in accordance with the provisions of Rule 73(c) of the Federal Rules of Civil Procedure.

Now Therefore, we the undersigned sureties, do hereby obligate ourselves, jointly and severally to the United States of America in the sum of Two Hundred and Fifty Dollars (\$250.00) to secure the costs on appeal in the above action as required by Rule 73(c) of the Federal Rules of Civil Procedure if the appeal is dismissed or the judgment affirmed, or of the costs such as the Appellate Court may allow if the judgment is modified. And said sureties consent and agree that in the case of default or contumacy of the said Evert L. Hagan or his attorney, the Court may upon notice to the said Evert L. Hagan of not less than 10 days, proceed summarily and render judgment upon this obligation and award execution thereon.

Witness our hands and seals this 29th day of August, 1955. [53]

/s/ GILBERT MONCADA.

/s/ L. C. McCRAY,

State of California

County of Los Angeles—ss.

Lowry C. McCray and Gilbert Moncada, the sureties whose names are subscribed to the above bond for costs upon appeal under Rule 73(c) of the Federal Rules of Civil Procedure, each being sworn, for himself says: I am a resident and freeholder in the County of Los Angeles, State of California, and am worth the sum of the undertaking specified, as the penalty thereof, over and above all my just debts and liabilities, exclusive of property exempt from execution. And the said sureties acknowledged that they had executed the bond attached.

/s/ L. C. McCRAY,

/s/ GILBERT MONCADA.

Subscribed and sworn and acknowledged before me this 29th day of August, 1955.

/s/ [Indistinguishable],

Notary Public in Said County
and State.

My commission expires March 15, 1957.

Approved:

/s/ WILLIAM M. BYRNE,

Judge, U. S. District Court.

Affidavit of service by mail attached.

[Endorsed]: Filed August 31, 1955. [54]

[Title of District Court and Cause.]

DEFENDANT'S ADDITIONAL DESIGNA-
TION OF RECORD ON APPEAL

Comes Now the defendant-appellee United States of America, pursuant to Federal Rule of Civil Procedure 75(a), and within the time permitted, designates additional portions of the record and proceedings, to be included in the record on appeal as follows:

1. The Complaint served on March 16, 1955.
2. Motion to Dismiss filed May 13, 1955.
3. Memorandum of Points and Authorities in Support of Motion to Dismiss filed May 13, 1955.
4. Order Granting Motion to Dismiss filed June 3, 1955.
5. Motion to Dismiss First Amended Complaint and Motion for a More Definite Statement filed June 30, 1955.
6. Order Granting Motion to Dismiss filed August 10, 1955. [56]
7. Defendant's Additional Designation of Record on Appeal.

Dated, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant United States
Attorney.

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant- Ap-
pellee, U. S. of America.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 9, 1955. [57]

United States District Court
For the Southern District of California
Central Division

No. 17876-WB Civil

EVERT L. HAGAN, Administrator of the Estate
of J. A. Hagan,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The defendant's motion to dismiss the first amended complaint for want of jurisdiction over the subject matter and for failing to state a claim upon which relief can be granted having been heard on July 18, 1955, and an order entered herein on August 10, 1955, granting the motion and granting the plaintiff, Evert L. Hagan, Administrator of the

Estate of J. A. Hagan, 20 days within which to amend his complaint and said amendment not having been filed within the time prescribed, now on motion of Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney, attorneys for the defendant,

It Is Hereby Adjudged and Decreed that the above entitled action be and it hereby is dismissed [59] for want of jurisdiction of the subject matter and for not stating a claim upon which relief may be granted; that this dismissal is not to operate as an adjudication on the merits; that the plaintiff take nothing by virtue of the complaint; and that the defendant have its costs in the amount of \$35.00 to be taxed by the Clerk of the Court.

Dated: October 12, 1955.

/s/ WILLIAM M. BYRNE,

United States District Judge.

Presented by:

/s/ BRUCE I. HOCHMAN,

Assistant United States
Attorney.

Affidavit of service by mail attached.

Lodged: Oct. 3, 1955.

[Endorsed]: Filed, entered Oct. 12, 1955. [60]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 61, contain the original

Complaint;

Notice of Motion to Dismiss, etc.;

Order Granting Motion to Dismiss;

First Amended Complaint;

Notice of Motion to Dismiss First Amended Complaint, etc.;

Order Granting Motion to Dismiss;

Notice of Appeal;

Statement of Point on Appeal;

Request & Designation of Portions of Record, etc.;

Defendant's Additional Designation of Record on Appeal;

Judgment;

and a full, true and correct copy of the Minutes of the Court for July 21, 1955, and Cost Bond on Appeal, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 28th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH
TO FILE NOTICE OF APPEAL

Pursuant to Motion of Plaintiff requesting an order extending time in which to file Notice of Appeal properly noticed for hearing on January 6, 1956, and heard by the Court on that date, all parties to this action being represented by their respective counsel of record, and good cause appearing therefore under Rule 73(a).

It Is Hereby Ordered that plaintiff may have to and including the 9th day of January, 1956, in which to file Notice of Appeal from the judgment entered in this action on October 12, 1955.

Dated: January 9, 1956.

/s/ WILLIAM M. BYRNE,
Judge of the District Court.

Approved as to form January 9, 1956.

LAUGHLIN E. WATERS,
United States Attorney.

By /s/ EDWARD R. McHALE,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 9, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court
and to the United States of America, and to
Its Attorney, Laughlin E. Waters, United
Attorney:

Please take notice that plaintiff, Evert L. Hagan,
hereby appeals to the United States Court of Ap-
peals for the Ninth Circuit from the judgment en-
tered and docketed in this action on October 12, 1955.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff.

Receipt of copies acknowledged.

[Endorsed]: Filed Jan. 9, 1956.

[Title of District Court and Cause.]

STIPULATION RE RECORD UPON APPEAL

It is hereby stipulated between plaintiff and defendant, through their respective counsel of record, as follows:

1. That the following documents be added to and made a part of the record on appeal in this action:

A. The order of the Court made January 9, 1956, extending time in which to file Notice of Appeal.

B. Plaintiff's Notice of Appeal filed January 9, 1956.

C. This Stipulation.

2. That the foregoing items and the record on appeal now in the hands of the Clerk of the Ninth Circuit Court of Appeals shall constitute the record on appeal in this action to the Ninth Circuit Court of Appeals.

Dated: January 9, 1956.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff,

LAUGHLIN E. WATERS,
United States Attorney,

By /s/ EDWARD R. McHALE,
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 9, 1956.

[Endorsed]: No. 14957. United States Court of Appeals for the Ninth Circuit. Evert L. Hagan, Administrator of the Estate of J. A. Hagan, deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed November 30th, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 14957

EVERT L. HAGAN, Admin. of the Estate of J. A.
HAGAN,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ADOPTION BY THE APPELLANT OF THE
STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF THE RECORD
ON APPEAL HERETOFORE APPEAR-
ING IN THE TYPEWRITTEN TRAN-
SCRIPT OF THE RECORD

Comes now the Appellant in the above-referred appeal, appearing in propria persona, and hereby signifies to the Court that he adopts for the purposes of this appeal the Statement of Points on Appeal and Designation of the Record as is now contained in the typewritten transcript of the record upon appeal, to the same manner and with the same effect as if the same had been prepared in accordance with Rule of Court 17(6).

Dated: December 3rd, 1955.

/s/ EVERT L. HAGAN,
Appellant.

[Endorsed]: Filed Dec. 16, 1955.

[Title of District Court of Appeals and Cause.]

APPELLEE'S ADDITIONAL DESIGNATION
OF RECORD ON APPEAL NECESSARY
TO BE CONSIDERED AND PRINTED

Pursuant to Rule 17(6) of this Court, appellee hereby designates as necessary to be considered and printed for the record on appeal the contents of its additional designation of record on appeal filed in the District Court, as if set forth in haec verba here, and in addition, the following:

- (1) Judgment entered on October 12, 1955;
- (2) This designation.

Dated: This 22nd day of December, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States At-
tor, Chief, Tax Division,

BRUCE I. HOCHMAN,
Assistant United States
Attorney.

/s/ BRUCE I. HOCHMAN,
Attorneys for Appellee.

Affidavit of service by mail attached.

[Endorsed]: Filed Dec. 24, 1955.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

EVERT L. HAGAN, Administrator of the Estate of J. A.
Hagan, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney.

EDWARD R. McHALE,
BRUCE I. HOCHMAN,
Assistant United States Attorneys,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILE

JUL 14 1956

PAUL P. O'BRIEN, CL

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No. 14957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, Administrator of the Estate of J. A.
Hagan, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court did not render an opinion in granting the motion to dismiss first amended complaint.

Jurisdiction.

This appeal involves federal income taxes for the years 1945 and 1946. Jurisdiction of the District Court was claimed by the administrator to be conferred by 28 U. S. C., Section 1346 [R. 19]. After motion of the United States to dismiss the administrator's first amended complaint for want of jurisdiction over the subject matter and for failing to state a claim upon which relief could be granted [R. 47], judgment was entered on October 12,

1955 [R. 58] dismissing the first amended complaint [R. 19-45]. On January 9, 1956, and within the time allowed the administrator by the District Court's order extending time in which to file notice of appeal [R. 60], notice of appeal was filed [R. 61]. Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in dismissing the first amended complaint where the complaint did not show that claims for refund were filed within the time limitations provided by Section 322 or Section 3801 of the Internal Revenue Code of 1939, and where the complaint showed that there had not been a determination that resulted in a "Circumstance of Adjustment" under Section 3801 of the Code.

Statutes and Regulations Involved.

The pertinent statutes and Regulations will be found in the Appendix, *infra*.

Statement.

The District Court granted the motion of the United States to dismiss the first amended complaint [R. 57-58]. From this judgment the taxpayer now appeals [R. 61].

The first amended complaint alleged in substance as follows:

This action is one to recover income taxes erroneously and illegally assessed and collected [R. 19-20].

Evert L. Hagan, a citizen of the United States, is the duly qualified and acting administrator of the estate of J. A. Hagan [R. 19].

J. A. Hagan, doing business as the El Rey Cheese Company, on March 15, 1946, made a return for the calendar year 1945 and on March 15, 1947, made a return for the calendar year 1946 for federal income taxes, showing \$592.04 and \$3,181.95, respectively, for taxes due. Each amount was remitted with the return to the Collector of Internal Revenue at Phoenix, Arizona [R. 20, 23-24].

There existed between J. A. Hagan and his brother, Evert L. Hagan, a partnership in the El Rey Cheese Company [R. 20, 24].

On January 9, 1950, the Commissioner of Internal Revenue filed a notice of jeopardy delinquent tax assessment against Evert L. Hagan for the years 1945 and 1946 claiming deficiencies based upon the alleged net income of the El Rey Cheese Company [R. 21, 24].

A re-audit of the books of the El Rey Cheese Company for the years 1945 and 1946 showed that there was no net income on account of the operations of the company for these years [R. 21, 24-25].

Evert L. Hagan timely filed a petition in the United States Tax Court for redetermination of his tax liabilities for the years 1945 and 1946 [R. 21, 24].

By stipulation it was agreed there was no tax liability upon Evert L. Hagan for the years 1945 and 1946 on account of the net income arising out of the operation of the El Rey Cheese Company. The stipulation was adopted by the Tax Court in entering its decision on January 19, 1953, disposing of the case and determining that there was no tax liability upon Evert L. Hagan [R. 21, 25].

The stipulation and the decision of the Tax Court constituted a determination under Section 3801 of the Internal Revenue Code; the effect thereof was to allow J. A.

Hagan, partner of Evert L. Hagan, to claim a refund for an adjustment, correction and refund, notwithstanding the fact that the ordinary period limitation for claiming had run [R. 21-22, 25].

On September 6, 1952, appellant-administrator filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$592.04, plus interest, and for \$3,181.95, plus interest, for the taxes paid in 1945 and 1946, respectively. [Copies of these claims are made a part of this complaint, Exs. A and D.] [R. 22, 25-26, 28-29, 44-45.]

In December of 1953, the representatives of the Government corresponded with the administrator and indicated they were going to reject the claims; thereafter on December 10, 1953, administrator called attention to the determination of the Tax Court. In the months of April and May 1954 there were conferences and correspondence following up the contention of the administrator that the determination of the Tax Court constituted a determination under Section 3801 of the Internal Revenue Code. [This correspondence is incorporated into the complaint as Ex. B.] [R. 22, 26, 30-42.]

The correspondence and conferences which were initiated in December, 1953, constituted informal claims for refund under Section 3801 of the Internal Revenue Code and the representatives of the Government accepted them as such and dealt with the claims made in this manner the same as if they had been formally presented. They purported to rule upon the merits of the claims and did not reject the claims because of the form in which they were presented [R. 22-23, 26].

The demands for refund have been refused by the Government [Ex. C; R. 43; 23, 26-27].

Exhibits A and D to the administrator's first amended complaint are claims for refund for the years 1945 and 1946, and are allegedly dated September 6, 1952. The reasons set forth in support of the claims were that an audit of the books of the El Rey Cheese Company revealed that the business sustained a net operating loss, and also that a deficiency determination and assessment had been made against Evert L. Hagan, the brother and general agent in fact of the taxpayer-decedent for the alleged earnings of the business on the grounds that the business did not belong to James A. Hagan but rather to Evert L. Hagan [R. 28-29, 44-45].

Exhibit B sets forth a letter dated December 10, 1953, in which the administrator refused to sign a claim withdrawal form, stating [R. 30-31]:

You no doubt aware, or can become aware, that the government by stipulation agreed to a decision that has been entered by the United States Tax Court in Docket #27441 adjudged that I was not personally liable for any taxes for these years. My brother's liability as associate or partner could be no greater than mine. Therefore if I owed nothing then he overpaid. This decision was entered January 19, this year.

Additionally, Exhibit B sets forth a letter dated May 17, 1954, to the Regional Commissioner, Internal Revenue Service, in which the administrator stated in part [R. 33-34]:

Pursuant to our conference of April 23rd, 1954, I have had my attorney look into the question of whether or not the statute of limitations acted as a bar to the above-described claim. After somewhat conclusive study it is his opinion that the bar of the

Statute of Limitations is removed by the effect of Section 3801, Internal Revenue Code. The facts will show that though no formal partnership had been entered into between myself and J. A. Hagan in the operation of the El Rey Cheese Company that in effect it was a family partnership, and other courts have on a full review of the facts in effect so held. This being so the effect of the determination with regard to my tax liability during the years 1945 and 1946 when this relationship existed would have the effect of allowing for an adjustment in face of the regular Statute of Limitations.

Also included in Exhibit B is a letter dated May 20, 1954, from the Regional Commissioner, Internal Revenue Service, in which the administrator is informed relative to the refund claims for the years 1945 and 1946 that the "determination" of the Tax Court did not meet the requirements of Code Section 3801(b), "Circumstances of Adjustment." [R. 41-42.]

The Government moved the court to dismiss the first amended complaint on the grounds that the court lacked jurisdiction over the subject matter and that the first amended complaint failed to state a claim upon which relief could be granted [R. 16-18, 47-48].

An order granting the motion to dismiss was made on August 10, 1955 [R. 49-50], and the administrator appeals from the judgment which was entered on this order on October 12, 1955 [R. 57-58].

Summary of Argument.

1. In order for the administrator to maintain this action, it is necessary that a claim for refund have been timely filed, and that the claim set forth the grounds upon which the cause of action in this Court is based. Under Section 322(b) of the Internal Revenue Code of 1939, generally applicable to refund claims, it was necessary for the administrator to file a claim within three years from March 15, 1946, and March 15, 1947, the dates on which returns were filed and taxes paid. This was not done since the complaint alleges that the claims first filed were dated September 6, 1952.

The administrator, however, contends that Section 3801 of the Code applies in this case in mitigation of the effect of the limitations prescribed in Section 322. While it is the Government's position that Section 3801 does not apply, even assuming that it does, the administrator has failed to file a claim for refund within the time required by that section, which would be January 19, 1954. The first time that the administrator made any reference to Section 3801 (and it is not conceded that even then a valid claim for refund was made) was on May 17, 1954. This was not timely. The formal claims dated September 6, 1952, and the alleged informal claim dated December 10, 1953, all failed to set forth Section 3801 as a grounds for recovery and all failed to set forth facts under which Section 3801 would apply. Since the formal claim and the letter of December 10, 1953, were not based upon the same cause of action upon which the alleged claim of May

17, 1954, was set forth, they may not be amended by the later claim. It has been held by the Supreme Court that a claim based upon one cause of action might not be amended by a claim based upon a second and separate cause of action where the later claim is barred by the statute of limitations. Also, the contention of the administrator that the Commissioner, by purportedly ruling on the merits of the administrator's claims under Section 3801, has waived the usual requirements for refund claims is not supported by case law. While the Commissioner might waive procedural requirements of the Regulations, he does not have the authority to waive the statutory mandate that a claim setting forth the cause of action must be timely filed.

Since the administrator has failed to allege a timely filing of a claim for refund, and this requirement of Congress is jurisdictional in nature, the District Court was correct in granting the motion of the United States to dismiss the complaint.

2. In addition, the complaint clearly fails to meet the specific requirements of Section 3801 and thus that section is not applicable. In order for the administrator to avail himself of the benefits of Section 3801, it is incumbent that he fit precisely within its framework.

The decision of the Tax Court stated only that Evert L. Hagan was not liable for income taxes for the years 1945 and 1946. It did not state the grounds upon which it based this determination, and it is submitted that this is not the type of a "determination" which is required by

Section 3801(a)(1)(B). Also, it is not possible to ascertain from the so-called determination of the Tax Court whether or not the Tax Court adopted a position maintained by the Commissioner which was inconsistent with the erroneous inclusion of net income as is required by subsection (b). The decision of the Tax Court, in addition to meeting the two above discussed requirements, must also, according to subsection (b)(1) require the inclusion in gross income of an item which was erroneously included in the gross income of a related taxpayer. Obviously, there was not such a requirement in the case at bar. On the contrary, it was specifically decided that Evert L. Hagan was not deficient in his taxes for the years 1945 and 1946 and the effect of this decision was that he was not required to include any items at all within his gross income. It can therefore be seen that the situation herein does not meet the specific conditions under which Section 3801 becomes applicable. Since Section 3801 does not apply to mitigate the effect of the statute of limitations as prescribed in Section 322, the administrator's claims are barred by his failure to file claims for refund within the time allowed by Section 322 of the Code.

Therefore, it is submitted that the judgment of the District Court dismissing the administrator's first amended complaint was correct and should be affirmed.

ARGUMENT

I.

The District Court Did Not Have Jurisdiction Over This Action Since the First Amended Complaint Failed to Allege the Filing of Claims for Refund Within the Time Limitations Provided by Section 322 or Section 3801 of the Internal Revenue Code of 1939.

In order for the administrator to maintain this action, it is necessary that a claim for refund have been timely filed (*Noland v. Westover*, 172 F. 2d 614 (C. A. 9th), certiorari denied, 337 U. S. 938), and that the claim set forth the grounds upon which the cause of action in this Court is based (*Vica Co. v. Commissioner*, 159 F. 2d 148 (C. A. 9th), certiorari denied, 331 U. S. 833).

Section 7422(a) of the Internal Revenue Code of 1954 (Appendix, *infra*) provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, until a claim for refund or credit has been duly filed. The allegations of the first amended complaint, hereafter referred to as "complaint", show that there was not in this instance a timely filing of a valid claim for refund.

Section 322(b) of the Internal Revenue Code of 1939¹ (Appendix, *infra*), which is applicable to the question of filing of claims for refund (other than claims arising under Section 3801 of the Code), provides that a claim must be filed within three years from the time the return was filed by the taxpayer or within two years from the time the

¹References to "Code" or "Internal Revenue Code" refer to the Internal Revenue Code of 1939 unless otherwise noted.

tax was paid, whichever period expires the later. The complaint (paragraph IV of the first cause of action and paragraph II of the second cause of action) alleges that returns were filed and payments made on March 15, 1946, and on March 15, 1947 [R. 20, 23-24]. Thus, under Section 322, to be eligible for a refund, claims must have been filed within three years or no later than March 15, 1949, and March 15, 1950. Yet the complaint (paragraphs V and III) alleges that the claims were first filed on September 6, 1952 [R. 22, 25]. Patently, the requirements of Section 322(b) have not been met and the administrator did not timely file his claims for refund under that section.

The administrator contends, however, that Section 3801 of the Code (Appendix, *infra*) applies in this case to mitigate the effect of the limitations prescribed in Section 322. While the second point of argument of the United States will show that the complaint does not state a situation which falls under Section 3801 for several reasons, for the purposes of argument only it will be assumed that Section 3801 is applicable. Even then, it is submitted, a claim for refund was not timely filed. Section 3801(c) provides that an adjustment for overpayment may be made as if on the date of the determination one year remained before the expiration of the periods of limitation upon filing claims for refund. Since the administrator has alleged that a determination within the meaning of Section 3801 took place on January 19, 1953 [R. 21, 25], it then follows that a claim for refund, to be timely filed, must have been made on or prior to January 19, 1954. It is clear from the complaint that the claim for refund under Section 3801, if one was made at all, was not made until the administrator's letter, dated

May 17, 1954, and thus was without the time prescribed by the statute.²

The first mention by the administrator of a cause of action based on Section 3801 took place on May 17, 1954, in his letter to the Regional Commissioner [R. 33-40]. The more or less formal claims³ filed on September 6, 1952 [R. 22, 25-26], prior to the alleged determination under Section 3801, can not serve as claims for refund under that section as they in no manner set forth Section 3801 or facts based on that section as grounds for recovery. Besides the formal requisites of the claim, it is necessary for the administrator to set forth the specific facts upon which he bases his contention that Section 3801 is applicable. Thus, in the instant case the administrator would first have to claim that Section 3801 applies; then that there had been a determination within the meaning of the section; that the Commissioner had taken an inconsistent position; that the inconsistency of the Commissioner has resulted in one of the "Circumstances of Adjustment" set forth by the section; and that the taxpayer-decedent and Evert L. Hagan were "related taxpayers" within the meaning of the section. It is clear that this could not have been done, and was not done in fact, in the claims of September 6, 1952, which was prior to the Tax Court

²It is doubtful that any valid claim at all for refund under Section 3801 was made. The purported claims which the taxpayer sets forth in Exhibits A, B, and D to his complaint [R. 28-42, 44-45] fail to meet the requirements of Regulations 111, Section 29.322-3 (Appendix, *infra*), in many respects. The statements of grounds and facts were not verified by the requisite written declaration that they were made under the penalties of perjury. There were not annexed to the claims the required certified copies of letters of administration. And the letters of December 10, 1953, and May 17, 1954, were not in the form specified by the Regulations.

³See footnote 2, *supra*.

determination of January 19, 1953. This Court has held that a claim for refund must contain an adequate statement of the taxpayer's contentions (*Vica Co. v. Commissioner, supra*) and in this case there has been no such statement. In addition, a reading of the letter dated December 10, 1953, from the administrator to the Audit Division of the Internal Revenue Service [R. 30-31] shows that it can not serve as a valid claim for refund since it, as all the other previous correspondence in this matter, failed completely to set forth the grounds upon which a recovery under Section 3801 might be based. The letter of December 10 did nothing to apprise the Internal Revenue Service that the administrator was claiming that Section 3801 of the Code applied. Indeed, there was no hint that the administrator was claiming that he fell within the mitigating provisions of Section 3801 until his letter of May 17, 1954 [R. 33-40], in which he quite clearly set forth his position in this respect. However, if a recovery was to be made under Section 3801, it was incumbent upon the administrator to file his claim for refund by January 19, 1954. It thus follows that the letter of May 17th of that year could not in any event serve as a timely claim for refund.

That the letter of May 17th, which was not a timely claim, could not serve as an amendment of the letter of December 10, 1953, is clear from the many decisions in this respect. The first formal claims [R. 28-29, 44-45] and the letter of December 10, 1953 [R. 30-31], were not based upon a cause of action arising out of Section 3801 of the Code. The letter of May 17, 1954, which the administrator contends to be a valid informal claim, was based upon a cause of action arising under Section 3801. It has been held that a claim based upon one cause of ac-

tion might not be amended by a claim based upon a second and separate cause of action where the later claim is barred by the statute of limitations. *United States v. Andrews*, 302 U. S. 517; *United States v. Garbutt Oil Co.*, 302 U. S. 528. The administrator's attempt to alter by amendment the cause of action out of which he claimed to be entitled to a refund is clearly proscribed by the holdings of the Supreme Court in the *Andrews* and *Garbutt Oil* cases, *supra*, and it is therefore submitted that since the letter of May 17, 1954, may not serve to amend the informal letter dated December 10, 1953, which the administrator contends to be a claim, the complaint on its face shows that if any claim for refund under Section 3801 was made at all it was not timely filed by January 19, 1954.

It is contended by the administrator that the Commissioner, by letter of May 20, 1954 [R. 41, 42], has purportedly ruled on the merits of the administrator's claims under Section 3801 and has therefore waived the usual requirements for refund claims. While there is some case authority for the proposition that the Commissioner might, by a consideration of the merits, waive any *procedural* requirements of his Regulations, there is likewise ample authority for the point that the Commissioner can not waive the statutory mandate that a claim setting forth the cause of action must be timely filed. In the *Garbutt Oil Co.* case, *supra*, the Supreme Court held that the Commissioner was without power to waive the bar of the statute of limitations against a claim for a tax refund. In that case the Supreme Court considered the same argument advanced by the administrator in the case at bar, namely, that although an attempted amendment of a claim was not timely, the Commissioner waived the time

requirement by considering the case on its merits. The Court clearly rejected this contention and stated (p. 533):

The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 71, wherein it was said: "The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research."

Thus, it can be seen that in the instant case, while the Commissioner might have waived the formal requisites of the Treasury Regulations for refund claims (although it is not conceded that he did so in this case), he did not have the power to waive the necessity of making a claim for refund on the cause of action in question within the time period required by statute.⁴ Since no claim for refund based on Section 3801 of the Code was filed within the one year period required by that statute, the claim is barred.

⁴*Keneipp v. United States*, 184 F. 2d 263 (C. A. D. C.), upon which the administrator places great reliance, presented a situation totally different from that at bar. In the *Keneipp* case, two claims for refund were filed, the first within the statutory period and the second subsequent to the time allowed. The court found that the first claim was sufficiently broad and definite to raise the cause of action upon which the complaint was based, and that the Commissioner had so considered the first claim. The second claim, untimely filed, was held to be merely a specification of the first claim, and thus was simply amendatory of the previous claim.

The requirements which Congress has set up by statute as the conditions under which the United States consents to be sued for the recovery of tax are jurisdictional in nature, and must be established by the person invoking the jurisdiction of the court. *United States v. Chicago Golf Club*, 84 F. 2d 914 (C. A. 7th). The administrator, in the complaint presently before this Court, has failed to establish that he has fulfilled the jurisdictional requirements of Section 7422 of the Internal Revenue Code of 1954, and hence the District Court correctly granted the motion of the United States to dismiss the complaint.

II.

Section 3801 of the Code Does Not Apply to Mitigate the Effect of the Statute of Limitations.

As shown in Part I of the Government's argument, the administrator, by his failure to file a claim for refund within the time prescribed in Section 322(b) of the Code is barred by Section 7422 of the Internal Revenue Code of 1954 from maintaining an action for the recovery of such taxes. The administrator contends, however, that the effect of Section 322 is mitigated by Section 3801 of the Code which he claims to be applicable. It is the position of the Government, as pointed out *supra* that, even assuming Section 3801 applies, the administrator failed to file a claim for refund within the time set forth by that statute. In addition, the complaint clearly fails to meet the specific requirements of Section 3801 and thus that section is not applicable. The effect of the statute of limitations is mitigated by Section 3801 under a certain set group of circumstances, and in order for the administrator to avail himself of the benefits of the section it is incumbent upon him to show that he fits precisely within

its framework.⁵ Under subsection (c) the bar of the statute of limitations is removed only if there is adopted in a determination within the meaning of the section one of the enumerated circumstances of adjustment described in subsection (b). Under subsection (b), so far as is pertinent to the case at hand, an adjustment is authorized only for a situation where (1) there has been a final decision of the Tax Court (2) which required inclusion in the gross income of Evert L. Hagan the net income of the El Rey Cheese Company, (3) this net income was erroneously included in the gross income of the taxpayer-decedent, (4) the decision of the Tax Court adopted a position maintained by the Commissioner which was inconsistent with the erroneous inclusion of this net income, (5) the taxpayer-decedent was a "related taxpayer" to Evert L. Hagan, and lastly, (6) on the date of the Tax Court decision the claim was barred by the statute of limitations.

The allegations of the first amended complaint fail to meet many of the precise requirements of Section 3801 set forth above. Paragraph IV of the first cause of action [R. 21] and paragraph II of the second cause of action [R. 25] state in part that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan,

⁵Section 3801 is thoroughly discussed in 2 Mertens, Law of Federal Income Taxation, Sec. 1401. It is there stated (p. 397):

The principal purpose of this provision was to avoid the confusion inherent in the application of the principles of estoppel, recoupment, and the statute of limitations, both by and against the government, in situations in which *an inconsistent position* had been taken either by the taxpayer or the taxing authority. Corrections are authorized only when the Commissioner, if the correction would result in an allowance of a refund or credit for the year with respect to which the error was made, or the taxpayer, if the correction would result in an additional assessment for such year, has maintained a position inconsistent with the error.

Petitioner, vs. Commissioner of Internal Revenue, Respondent" it was agreed there was no tax liability upon Evert L. Hagan for the years 1945 and 1946 on account of the net income arising out of the operation of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in entering its decision disposing of the case and determining that there was no tax liability upon Evert L. Hagan upon January 19, 1953. The administrator has nowhere stated that the Tax Court's decision which adopted the above-mentioned stipulation did any more than state that there were no deficiencies in the income taxes of Evert L. Hagan for the years in question. A decision of the Tax Court, based on a stipulation between the parties, such as the one at bar, in which no reasons at all are given for the decision, is not the type of decision which the section requires. In view of the necessity of ascertaining the basis of the Tax Court's decision, a determination solely that no taxes were due, with nothing more, would not appear to be a "determination" within the meaning of Section 3801(A)(1)(B).⁶

⁶See, *e.g.*, 2 Mertens, Law of Federal Taxation, pp. 425-426 where, in discussing a suggestion of Kent, Mitigation of the Statute of Limitations in Federal Income Tax Cases, 27 Cal. L. Rev. 109 (1939), that cases which are closed on the basis of a stipulation giving effect to settlement agreements while pending before the court should be included among the judgments considered to be a determination for purposes of the statute, it is stated:

The author considers that since it is the order of the Board entered pursuant to the stipulation which gives the latter its legal efficacy, these provisions must be broadly interpreted to include such settlements. In view, however, of the many variables entering into the usual settlement agreement and the frequent difficulty of determining what the Board has "determined," it would seem to be extremely doubtful whether anything less than a decision on the merits could be considered a determination in which an inconsistent position is adopted, unless the stipulation states in detail the items agreed to which enter into the agreed upon deficiency or refund.

The requirements of subsection (b) that the decision of the Tax Court adopt a position maintained by the Commissioner which was inconsistent with the erroneous inclusion of the net income is likewise not met. From the complaint it can be seen that it is impossible to discover whether or not the Tax Court's decision adopted an inconsistent position of the Commissioner, or indeed, that the Commissioner ever maintained an inconsistent position. From what can be discovered from the complaint, it is possible that the Tax Court and the Commissioner could have decided that the El Rey Cheese Company did not belong to Evert L. Hagan. In any event, there is nowhere shown an adoption of an inconsistent position maintained by the Commissioner.

The decision of the Tax Court, in addition to meeting the requirements that it be a determination within the meaning of the section and that it adopt an inconsistent position maintained by the Commissioner, must also, according to subsection (b)(1) require the inclusion in gross income of an item which was erroneously included in the gross income of a related taxpayer. Obviously, there never was any such requirement in the case at bar. The complaint does not allege that Evert L. Hagan was required to include within his gross income the net income of the El Rey Cheese Company. On the contrary, it was specifically decided that Evert L. Hagan was not deficient in his taxes for the years 1945 and 1946 and the effect of this decision was that *he was not required to include any items at all within his gross income*. Thus, it can be seen that the situation herein does not fall within any of the "Circumstances of Adjustment" of subsection (b) and that the administrator has failed completely to allege facts which would make Section 3801 applicable in his case.

Since Section 3801 does not apply to mitigate the effect of the statute of limitations as prescribed in Section 322, the administrator's claims are barred by his failure to file claims for refund within the time allowed by Section 322 of the Code.

Conclusion.

For the foregoing reasons, the judgment of the District Court dismissing the administrator's first amended complaint was correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General;

LEE A. JACKSON,

HELEN A. BUCKLEY,
Attorneys,

Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,

BRUCE I. HOCHMAN,
Assistant United States Attorneys.

July, 1956.

APPENDIX.

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

SEC. 3801. MITIGATION OF EFFECT OF LIMITATION AND OTHER PROVISIONS IN INCOME TAX CASES.

(a) *Definitions.*—For the purpose of this section—

(1) *Determination.*—The term “determination under the income tax laws” means—

(A) A closing agreement made under section 3760;

(B) A decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final; or

(C) A final disposition by the Commissioner of a claim for refund. For the purposes of this section a claim for refund shall be deemed finally disposed of by the Commissioner—

(i) as to items with respect to which the claim was allowed, upon the date of allowance of refund or credit or upon the date of mailing

notice of disallowance (by reason of offsetting items) of the claim for refund, and

(ii) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Commissioner in reduction of the refund or credit, upon expiration of the time for instituting suit with respect thereto (unless suit is instituted prior to the expiration of such time).

Such term shall not include any such agreement made, or decision, judgment, decree, or order which became final, or claim for refund finally disposed of prior to August 27, 1938.

(2) *Taxpayer*.—Notwithstanding the provisions of section 3797 the term “taxpayer” means any person subject to a tax under the applicable Revenue Act.

(3) *Related taxpayer*.—The term “related taxpayer” means a taxpayer who, with the taxpayer with respect to whom a determination specified in subsection (b) (1), (2), (3), or (4) is made, stood, in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance, or disallowance therein referred to was made, in one of the following relationships: (A) husband and wife; (B) grantor and fiduciary; (C) grantor and beneficiary; (D) fiduciary and beneficiary, legatee, or heir; (E) decedent and decedent’s estate; or (F) partner.

(b) [as amended by Sec. 211 (a) and (b), Technical Changes Act of 1953, c. 512, 67 Stat. 615] *Circumstances of Adjustment*.—When a determination under the income tax laws—

(1) Requires the inclusion in gross income of an item which was erroneously included in the gross income of

the taxpayer for another taxable year or in the gross income of a related taxpayer; or

(2) Allows a deduction or credit which was erroneously allowed for the taxpayer for another taxable year or to a related taxpayer; or

(3) Requires the exclusion from gross income of an item with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year or from the gross income of a related taxpayer; or

(4) Allows or disallows any of the additional deductions allowable in computing the net income of estates or trusts or requires or denies any of the inclusions in the computation of net income of beneficiaries, heirs, or legatees, specified in section 162 (b) and (c) of chapter 1, and corresponding sections of prior revenue Acts, and the correlative inclusion or deduction, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer; or

(5) Determines the basis of property for depletion, exhaustion, wear and tear, or obsolescence, or for gain or loss on a sale or exchange, and in respect of any transaction upon which such basis depends there was an erroneous inclusion in or omission from the gross income of, or an erroneous recognition or nonrecognition of gain or loss to, the taxpayer or any person who acquired title to such property in such transaction and from whom mediately or immediately the taxpayer derived title subsequent to such transaction; or

(6) Disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer; but

this paragraph shall apply only if (A) the determination became final on or after June 1, 1952, and (B) credit or refund of the overpayment attributable to the deduction or credit which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or the Tax Court of the United States, in writing, that he was entitled to such deduction or credit in the taxable year for which it is so disallowed; or

(7) Requires the exclusion from gross income of an item which is includible in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer; but this paragraph shall apply only if (A) the determination became final on or after June 1, 1952, and (B) assessment of deficiency under section 272(a) by the Secretary for such other taxable year or against such related taxpayer was not barred, by any law or rule of law, at the time the Secretary first maintained in a notice of deficiency sent pursuant to section 272(a) or before the Tax Court of the United States, that such item should be included in the gross income of the taxpayer for the taxable year to which the determination relates—and on the date the determination becomes final, correction of the effect of the error is prevented by the operation (whether before, on, or after May 28, 1938) of any provision of the internal-revenue laws other than this section and other than section 3761 (relating to compromises), then the effect of the error shall be corrected by an adjustment made under this section. Except in cases described in paragraphs (6) and (7) such adjustment shall be made only if there is adopted in the determination a position maintained by the Commissioner (in case the amount of the adjustment

would be refunded or credited in the same manner as an overpayment under subsection (c)) or by the taxpayer with respect to whom the determination is made (in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under subsection (c)), which position is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be. In case the amount of the adjustment would be assessed and collected in the same manner as a deficiency, the adjustment shall not be made with respect to a related taxpayer unless he stands in such relationship to the taxpayer at the time the latter first maintains the inconsistent position in a return, claim for refund, or petition (or amended petition) to the Tax Court for the taxable year with respect to which the determination is made, or if such position is not so maintained, then at the time of the determination.

(c) *Method of Adjustment*.—The adjustment authorized in subsection (b) shall be made by assessing and collecting, or refunding or crediting, the amount thereof, to be ascertained as provided in subsection (d), in the same manner as if it were a deficiency determined by the Commissioner with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year with respect to which the error was made, and as if on the date of the determination specified in subsection (b) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3801.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7422.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.322-3. *Claims for Refund by Taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable

to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see section 29.322-7.

If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In such cases, if a refund or interest is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. The affidavit may be made by the agent of the person assessed, but in such case a power of attorney must accompany the claim.

Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and may be sent to such persons in care of an attorney or agent who has filed a power of attorney specifically authorizing him to receive such checks. The Commissioner may, however, send any such check direct to the claimant. In this connection, see section 3477 of the Revised Statutes (paragraph 93 of the Appendix to these regulations).

The Commissioner has no authority to refund on equitable grounds penalties or other amounts legally collected. As to claims for refund of sums recovered by suit, see sections 29.322-4 to 29.322-6, inclusive.

NO. 24057

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEP L. EAGLE,

Administrator of the estate of

J. A. HAGAN, deceased,

Appellant,

UNITED STATES OF AMERICA,

Appellee.

WILLIAM H. HOGAN, DEPUTY ATTORNEY GENERAL,

Special Assistant to the Attorney

General of the United States,

Respondent.

WILLIAM H. HOGAN,
Deputy Attorney General,
Special Assistant to the Attorney
General of the United States,
Respondent.

FILED

JUL 25 1933

PAUL P. O'BRIEN, CLERK



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1. The following information is being furnished to you for your information:

- (1) The following information is being furnished to you for your information:
- (2) The following information is being furnished to you for your information:

ADMINISTRATIVE INFORMATION

The following information is being furnished to you for your information:

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ADMINISTRATIVE INFORMATION

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ADMINISTRATIVE INFORMATION

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2000-01-01 to 2000-01-01

NO. 14957

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT L. HAGAN, Administrator of the Estate of
J. A. HAGAN, Deceased,

Appellant

VS

UNITED STATES OF AMERICA,

Appellee

An Appeal From The Judgment of The
United States District Court For
The Southern District of California.

APPELLANT'S: REPLY STATEMENT

Appellant in this reply brief will answer the contentions made by Appellee in its brief. As near as the Appellant can ascertain the Appellee contends: Firstly, that no "determination" was alleged in the claim for relief which would invoke the provisions of Section 3801 of the Internal Revenue Code. And secondly, that even though there was such a "determination" that there was no timely claim for a refund made within the one year statutory limit under Section 3801.

Appellant wishes to set for the full text of the letter

are not to be taken as evidence of
any kind of approval or disapproval
on the part of the Government
in relation to the subject of the
report.

Very
respectfully,
Your obedient servant,
J. M. Smith

Enclosed is a copy of the report
of the committee on the subject of
the proposed amendment to the
constitution of the United States
relating to the right of the States
to secede from the Union.

Yours
truly,
J. M. Smith

Very
respectfully,
Your obedient servant,
J. M. Smith

The enclosed is a copy of the report
of the committee on the subject of
the proposed amendment to the
constitution of the United States
relating to the right of the States
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Your obedient servant,
J. M. Smith

The enclosed is a copy of the report
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relating to the right of the States
to secede from the Union.

of December 10, 1953, Exhibit "B" to the claim for relief, a thing which the Appellee apparently chose not to do. (Transcript of Record, page 30.) It is as follows:

Dec. 10, 1953

Mr. A. S. Allen
Audit Division
1031 S. Broadway
Los Angeles, Calif.

Re: Claim for Refund, Estate
of J.A. Hagan 1945 & 1946

Dear Sir:

Answering yours of 12-1-53 requesting that I sign a claim withdrawal form in the above referred claim, I must refuse to do so.

You no doubt are aware, or can become aware, that the Government by stipulation agreed to a decision that has been entered by the United States Tax Court in October 1944 and judged that I was not personally liable for any taxes for these years. My brother's liability as associate or partner could be no greater than mine. Therefore, if I did nothing, then he overpaid. This decision was entered Jan 19th this year.

Please reconsider the claim in the light of this additional fact.

Yours truly,

(s) Avert L. Hagan

The inclusion of the final paragraph of this letter clearly demonstrates that the Appellant was requesting the Internal Revenue Bureau to reconsider the claims in the light of the facts therein contained. And Appellant earnestly urges that these facts were such as would invoke the provisions of Section 3001. And the fact that the section

1910-1911

[illegible]

was not mentioned by name certainly could not alter the situation in view of the authorities Appellant will point out later in this reply brief. For the claim for relief alleges that from that point hence the Appellant and the Commissioners representatives treated the claim as an informal claim under Section 3801, and the Commissioner determined the claim upon the merits with a full understanding of Appellants position that the limitations of Section 3801 was applicable.

"Exhibit "3" further contained a letter from Joseph T. Harlacher, Assistant Regional Commissioner, Appellate, dated May 20, 1954. In this letter the exact wording of the decision of the Tax Court of January 19, 1953 was set forth fully in the third paragraph (page 42 Transcript of Proceedings). It is as follows:

"The Tax Court, in its decision in the case of Ewert Leo Hagan, Docket No. 27441, ordered and decided 'that there are no deficiencies in income taxes or penalties due from, or overpayment due to, petitioner for the taxable years 1945 and 1946.'"

This Honorable Court should further consider the claim for relief alleged that the books and records of the El Rey Cheese Company were subsequently to the Commissioner's Deficiency assessment reaudited, and that the re-audit upon which the stipulation and subsequent decision were based showed the company had not during the years 1945 and

1946 made any net taxable income.

APPELLANTS CONTENTIONS

I

The claim for relief alleged a "determination" with-
in the meaning of Section 3001 I.R.C.

II

A timely and valid claim for refund under Section
3001 I.R.C. was alleged in the claim for relief.

POINTS AND AUTHORITIES

I

IN SUPPORT OF CONTENTION I

In Mertens "Law of Federal Income Taxation", Vol. 2,
Chapter 14, para 46, it is said:

It has been suggested that cases which are
closed on the basis of a stipulation giving rise
to settlement will be included among the judgments
considered to be a determination for this purpose.
The author was referring to I.R.C. Section 3001.

In a comment in a note to the text Mertens says that
where it is difficult to determine what was "determined"
that the quoted text might not apply. In the instant case
it is easily apparent that the decision which was based
actually upon the Commissioners acceptance of a refund
showing no tax liability was a "determination" that there
nevertheless was no tax liability. In the instant case
Hvert Hagan, who had filed no return had no tax liability
for 1945 and 1946.

S See also Kent "Mitigation of the Statute of Limitations in Federal Tax Cases", 27 California Law Rev. 102, 103, 113 wherein it is said:

"Of much greater practical moment is the question which has been raised whether a determination under Section 820 (a) (2) (now Section 3801 I.R.C.) includes the closing of cases pending before the Board of Tax Appeals on the basis of stipulations giving effect to settlement agreements negotiated between the taxpayer and the Technical Staff of the Bureau of Internal Revenue. Leaving out of account for the present the so-called lump sum settlements which involve a special problem, it is believed that a reasonable interpretation of the section should lead to an affirmative answer to this question. There is essentially the same reason of policy for including such cases as cases of closing agreements. Moreover, it is the order of the Board entered pursuant to the stipulation which technically gives the latter its legal efficacy. A contrary interpretation would make the section a serious obstacle to the expeditious settlement of such cases by stipulation.

II

THE POINT OF CONTENTION NO. II

In *Keneipp v U.S.* 184 F(2) 263, 267, it is said:

"The principles which determine the sufficiency of claims for refund have been stated and restated. The rule is that the claim must be sufficient to advise the Commissioner of Internal Revenue as to the items as to which the taxpayer claims error and the grounds upon which the taxpayer makes his claim. If the Commissioner understands the grounds and deals with the claim on the basis of his understanding, the claim is sufficient. A basic public policy is involved in this broad doctrine. Insistence upon nice technicalities of expression on the part of taxpayers in dealings with the Government concerning taxes must certainly compel taxpayers to deal with the Government through

technicians. The Bureau of Internal Revenue has long sought to encourage a direct, informal non-technical presentation."

See Also:

Bemis Bros. Bag Co v U.S.
77 Law Ed. 1011
U.S. vs Memphis Cotton Oil Co.,
77 Law Ed. 619
U.S. vs Factors & vin. Co.
77 Law Ed. 633

In Mertens, vol. 10, Section 58.24, it is said:

"There is no limit upon the number of refund claims that may be filed within the statutory period applicable to the filing of claims. Thus a defective claim may be easily corrected by the filing of a new claim which complies with the requirements. Frequently new grounds or facts are discovered, which either entitles the taxpayer to amounts of refund in addition to those already demanded, or which further sustain the claim already filed."

See:

U.S. v. Hagan, 15 W(2) 377
with 221 F.2d 803, 135 F.2d 773,
1940 P-H 2d 541

ARGUMENT AND CONCLUSION

The allegation of the claim for relief clearly demonstrates these facts: (a) J. A. Hagan and Evert L. Hagan were brother partners in the Wl Roy Cheese Co. during the years 1945 & 1946; (b) That in January 1950 the Commissioner made a deficiency assessment against Evert L. Hagan for these years for the alleged profits Evert L. Hagan had received; (c) That for these years J. A. Hagan had paid the income taxes now the subject of this suit; (d) That a re-

audit of the company books showed there actually was no profit, and that the government accepted this re-audit and agreed to stipulate that Evert L. Hagan owed no taxes for these years in the petition for redetermination matter that was pending before the Tax Court; (e) That thereafter upon January 19, 1953 the Tax Court entered a decision stating that there were no deficiencies against Evert L. Hagan for 1945 and 1946; (f) That the estate of J. A. Hagan in Sept. of 1952 filed a claim for refund setting up the facts of the re-audit, and in December 1953 (within 1 year of the Tax Court determination) the Administrator of J. A. Hagan's estate requested reconsideration of the claims upon the basis of the Tax Court determination.

From that point hence, it is alleged, that the Commissioner treated the claim as an informal one under Section 3801 and finally rendered a decision on the merits as to whether or not Section 3801 relieved the ordinary statute of limitation. Appellant earnestly contends that if the spirit of the section, in the light of the existing case law, is to be followed, this court will hold first that there was a "determination" within the provisions of Section 3801, and that the letter of December 10, 1953 constituted an informal claim under Section 3801, and will therefore hold that the claim for relief is a legal and valid one

requiring an answer from the Appellee.

Jesse A. Hamilton
Attorney for Appellant



10. 14957

IN THE
UNITED STATES

CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 23 1956

PAUL P. O'BRIEN, CLERK

WALTER L. HAGAN, ADMINISTRATOR)
OF THE ESTATE OF J. A. HAGAN,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Respondent,)
_____)

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the
Southern District of California, Central Division.

Jesse A. Hamilton,
Attorney for Appellant,
2208 W. 8th Street
Los Angeles 5, California
Tel: DU 9-3181



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(3)

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVERT L. HAGAN, ADMINISTRATOR OF)

THE ESTATE OF J. A. HAGAN,)
Appellant,)

vs.)

UNITED STATES OF AMERICA,)
Respondent,)

No. 14957

STATEMENT

Appeal is whether or not the First Amended Complaint states a good claim for relief or cause of action. The District Court granted a Motion to Dismiss the action filed by the Defendant. From this ruling this appeal was taken.

The First Amended Complaint alleges:

- (1) That Plaintiff was Administrator of the Estate of J. A. Hagan.
- (2) That the action was brought under Section 1215 (a)(1) of Title 28 U.S. Code.
- (3) That J. A. Hagan and Evert L. Hagan were in fact partners during the years 1945 and 1946, operating the

El Rey Cheese Co.

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(4)

- (4) That J. A. Hagan made a return in the amount of, and paid taxes in the sum of \$522.04 for 1945 and \$3181.95 for 1946, on supposed profits of the El Ray Cheese Co.
- (5) That upon January 2, 1950 the Commissioner of Internal Revenue made a deficiency assessment against Wvert L. Hagan for alleged profits made by Wvert L. Hagan from the operation of the El Ray Cheese Company.
- (6) That within the required time Wvert L. Hagan petitioned the Tax Court of the U.S. for a redetermination of his tax liability for the years 1945 and 1946.
- (7) That a re-audit of the books and records of the Wvert L. Hagan Company for the years 1945 and 1946 disclosed there were no net profits but rather a loss for those years.
- (8) That upon January 12, 1953 the tax court of the United States rendered a decision and determination based upon written stipulation of counsel for both parties which ordered and decided that there were no deficiencies in income taxes or penalties due from Wvert L. Hagan for the years 1945 and 1946.
- (9) That upon September 6, 1952 plaintiff in this action filed form #843 claiming a right to refund of taxes paid by J. A. Hagan for the years 1945 and 1946, and based the claim upon the re-audit which disclosed there was no taxable income due from J. A. Hagan on account of operation of the El Ray Cheese Co. for these years.

The purpose of this paper is to present a summary of the work done in the field of the history of the United States during the last few years.

The first part of the paper is devoted to a general survey of the progress of the work in the field of the history of the United States during the last few years.

The second part of the paper is devoted to a detailed study of the work done in the field of the history of the United States during the last few years.

The third part of the paper is devoted to a detailed study of the work done in the field of the history of the United States during the last few years.

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The ninth part of the paper is devoted to a detailed study of the work done in the field of the history of the United States during the last few years.

The tenth part of the paper is devoted to a detailed study of the work done in the field of the history of the United States during the last few years.

The eleventh part of the paper is devoted to a detailed study of the work done in the field of the history of the United States during the last few years.

The twelfth part of the paper is devoted to a detailed study of the work done in the field of the history of the United States during the last few years.

(10) That within one year after the determination of the Tax Court in December 1953, the representative of the U.S. indicated they were going to recommend denial of the claims for refund and that Plaintiff called their attention to the "determination" of the Tax Court and asked that the claims be reconsidered in view of the Tax Court's decision; that thereafter the parties conferred and corresponded relative to the applicability of Section 3801 I.R.C.; and that the representatives of the Commissioner of Internal Revenue accepted the informal presentation of the claim under Section 3801 and ruled upon the merits of the claim but determined that J. A. Vagan and Thert L. Hagan were not "Related Taxpayers" so that Section 3801 I.R.C. would not apply and recommended the denial of the claims.

(11) That upon January 27, 1955, the Commissioner of Internal Revenue formally by registered mail refused the demand for refund.

(12) That the claims do not exceed the statutory limit of \$12,000.

1. The first part of the report is a general statement of the work done during the year.

2. The second part is a detailed account of the work done in each of the various departments.

3. The third part is a summary of the results of the work done during the year.

4. The fourth part is a statement of the financial position of the institution at the end of the year.

5. The fifth part is a statement of the progress made in the various departments during the year.

6. The sixth part is a statement of the work done in each of the various departments during the year.

7. The seventh part is a statement of the results of the work done during the year.

8. The eighth part is a statement of the financial position of the institution at the end of the year.

9. The ninth part is a statement of the progress made in the various departments during the year.

10. The tenth part is a statement of the work done in each of the various departments during the year.

11. The eleventh part is a statement of the results of the work done during the year.

12. The twelfth part is a statement of the financial position of the institution at the end of the year.

13. The thirteenth part is a statement of the progress made in the various departments during the year.

14. The fourteenth part is a statement of the work done in each of the various departments during the year.

15. The fifteenth part is a statement of the results of the work done during the year.

16. The sixteenth part is a statement of the financial position of the institution at the end of the year.

17. The seventeenth part is a statement of the progress made in the various departments during the year.

18. The eighteenth part is a statement of the work done in each of the various departments during the year.

19. The nineteenth part is a statement of the results of the work done during the year.

APPELLANT'S CONTENTIONS AND STATEMENT OF POINTS ON APPEAL

- (1) The First Amended Complaint stated a good claim for relief under Section 3801 Internal Revenue Code.
- (2) The correspondence, conferences and conduct of Plaintiff and Representatives of the United States caused the original claim to be converted into an informal claim for refund under Section 3801 I.R.C. presented within one year of the determination of the Tax Courts of the United States, and since the representatives of the Commissioner accepted it as such, understood it as such, and ruled upon it as such, then it is as valid as a formal claim.
- (3) The Motion to Dismiss the First Amended Complaint should not have been granted.

POINTS AND PRIORITIES

I

The First Amended Complaint stated a good cause for Action for a Claim for Refund under Section 3801 Internal Revenue Code.

Plaintiff submits that the above allegations state a valid claim for relief and that the Complaint should not have been dismissed.

The statute (Section 3801) allows adjustment under a section 4 where there has been an inconsistent determination in the case of a "related taxpayer".

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Mertens, "Law of Federal Taxation"

Vol 2, page 410, et. seq.

And a decision of the Tax Court is a "determination" as contemplated by Section 3801.

Mertens, "Law of Federal Taxation"

Volume 2, page 422

The Statute itself provides:

"The term related taxpayer means a taxpayer who, with the taxpayer with respect to whom a determination specified in subsection (b) (1), (2), (3), and (4) is made, stood, in the taxable year with respect to the erroneous inclusion, exclusion, omission, allowance, or disallowance therein referred to was made, in one of the following relationships:

X X (b) taxpayer."

See: "The Problems of Related Taxpayers: A Procedural Study"

66 Harv. L. Rev. 225

II

The claim having been made, even though informally within one year of the determination gave the plaintiff a right to relief under Section 3801.

For a recent decision discussing the requirements of claims for refund see Kencipp vs U.S. 85 Fed (2) 1047 (2) 263, 203 F(2) 397 where it was said:

THEORY OF THE EARTH'S HISTORY

BY J. H. M. J. VAN DER WOUDE

PROFESSOR OF GEOLOGY IN THE UNIVERSITY OF AMSTERDAM

AMSTERDAM: P. NOORDHOFF, 1925

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"The rule is that the claim must be sufficient to advise the Commissioner of Internal Revenue as to the items as to which the taxpayer claims error and the grounds upon which the taxpayer makes his claim. If the Commissioner understands the grounds upon which the taxpayer makes his claim and deals with the claim on the basis of his understanding, this claim is sufficient". (Emphasis Appellant's)

For an expression of the United States Supreme Court to the same effect see the case of Bonwit Teller and Co v U.S. 75 Law Ed. 1018.

Mortens, vol. 10 at page 341 says:

"There is no limit upon the number of refund claims which may be filed within the statutory period applicable to the filing of claims. Numerous cases have been decided and corrected by filing a new claim which complies with the requirements. Frequently new grounds or facts are discovered, which either entitles the taxpayer to amounts of refund in addition to those already demanded or which further sustain the claim already filed."

In the case of Davis v U.S. 46 F (2) 377 it was held that the protest of a taxpayer setting forth facts in regard to which the claim was regarded as an amendment to the claim.

CONCLUSION

The Complaint surely shows facts which if proved would make a case under Section 3801. And the exhibits to the Complaint show that the claim though originally filed prior to

THESE CONDITIONS OF JAMES HENRY AND DAVID OF NEW YORK

AND SIGNED BY THE HONORABLE JAMES HENRY AND DAVID

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AND SIGNED BY THE HONORABLE JAMES HENRY AND DAVID

the determination of the U.S. Tax Court, that both Plaintiff and Representatives of the Defendant treated it as if it were a claim under Section 3801. Plaintiff particularly calls attention to the two letters from representatives of the defendant dated April 19 and 20, 1954. They show that the reason the claim was rejected was because J. A. Hagan in their opinion was not a "related taxpayer" or Partner. And there is no intimation that they were rejecting the claim because of the manner or form in which it had been presented. In other words, the complaint sets out facts which show that within one year of the determination of the Tax Court the representatives of the Commissioner of Internal Revenue had been informed of the determination and that the Plaintiff was claiming rights under Section 3801. And the Commissioner had decided to deal with that understanding. The rule in the Keneipp Case should therefore be applicable, and Plaintiff urges that it then follows that the Motion to Dismiss should not have been granted; that the judgment herein entered should be reversed and the case remanded with directions to the District Court to require the Defendant to answer.

Respectfully Submitted,

Jesse A. Hamilton
Attorney for Plaintiff.

No. 14959

United States
Court of Appeals

for the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation,
Appellant,

vs.

MARINE TERMINALS CORP., a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

FEB -8 1956

CLERK

No. 14959

United States
Court of Appeals
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AMERICAN PRESIDENT LINES, LTD., a corporation,
Appellant,

vs.

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Transcript of Record

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District of California, Southern Division

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NAMES AND ADDRESSES OF ATTORNEYS

LILLICK, GEARY, OLSON, ADAMS and
CHARLES,

311 California Street,
San Francisco, California,
Counsel for Appellant.

BOYD and TAYLOR,

350 Sansome Street,
San Francisco, California,
Counsel for Appellee.

In the United States District Court, Northern District of California, Southern Division

No. 34067

AMERICAN PRESIDENT LINES, LTD., a corporation,
Plaintiff,

vs.

MARINE TERMINALS CORP., a corporation,
Defendant.

COMPLAINT FOR INDEMNITY

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is now and at all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and maintaining an office and place of business in the City and County of San Francisco, State of California.

II.

Defendant is now and at all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, and is authorized to do and is doing business in the City and County of San Francisco, State of California, and elsewhere.

III.

On or about January 30, 1952, defendant under-

took, as an independent contractor, pursuant to a then existing agreement between plaintiff and defendant, to perform certain stevedoring work aboard the SS President Polk, a vessel owned and operated by plaintiff and carrying passengers and freight for hire in interstate and foreign commerce, said vessel then lying alongside a pier at San Francisco, California.

IV.

Shortly after commencing stevedoring work on said date, defendant ascertained through its agents, servants, and employees the lack and absence of a safety latch on a heavy hatchbeam at No. 1 hatch on said vessel, which condition, if allowed to continue and remain while stevedoring work was being carried on in said hatch, would result in having the stevedores working in a dangerous, unsafe and unseaworthy place due to the imminent danger of said hatchbeam becoming dislodged from its position during cargo handling operations and falling into the hatch.

Plaintiff herein was unaware, not only prior to but at all times mentioned herein and until said hatchbeam became dislodged as hereinafter set forth, that said safety latch was missing from said hatchbeam, nor did defendant herein at any time prior to said dislodgment advise plaintiff of said dangerous, unsafe, and unseaworthy condition.

Notwithstanding such knowledge on the part of defendant as aforesaid, defendant negligently, recklessly, and without regard to the imminent peril to its employees, commenced cargo operations in said

hatch. Shortly thereafter said hatchbeam became dislodged when struck by certain cargo handling equipment being operated by and under the control of defendant's agents, servants, and employees, and fell into said hatch, striking and severely injuring a stevedoring employee of defendant, one Robert Williams, who was working in the course of his employment in said hatch.

V.

On or about April 3, 1952, said Robert Williams brought suit against American President Lines, Ltd., in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 416216, entitled "Robert Williams, Plaintiff, vs. American President Lines, Ltd., a corporation; The Doe Company; John Doe; and Richard Roe, Defendants", seeking recovery of \$250,000 general damages, together with past and future wage loss, medical expenses, and costs of suit. Attached hereto and made a part hereof, marked "Exhibit A", is a true and correct copy of the complaint in said action.

Because of the absolute liability of American President Lines, Ltd. to said Robert Williams based on the unseaworthiness of said hatchbeam as aforesaid, said action was compromised and settled by and between American President Lines, Ltd. and said Robert Williams on January 16, 1953, for the reasonable sum of \$62,500; a full and complete release was taken; and the action was dismissed with prejudice on January 19, 1953.

Expenses and costs attendant upon defense of

said action, and reasonably incurred in connection therewith, together with attorneys' fees reasonably incurred were in the total sum of \$5,063.

VI.

The sole, active, primary, and proximate cause of the injuries sustained by said Robert Williams was the negligent and reckless action of defendant Marine Terminals Corporation in proceeding with cargo operations while fully aware of the fact of the missing safety latch as aforesaid, whereby plaintiff herein has been damaged in the sum of \$67,563, as to which amount it is entitled to be fully indemnified by defendant.

No part of said sum has been paid, and the whole thereof is due, owing and unpaid.

VII.

This is a civil action between citizens of different states, where the amount in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs. Jurisdiction of this court is founded upon the provisions of 28 United States Code, Sec. 1332.

Wherefore, plaintiff prays judgment in the sum of \$67,563, together with costs of suit herein, and for such other and further relief as may be proper in the premises.

/s/ TREADWELL & LAUGHLIN,
/s/ CHARLES M. HAID, JR.,
Attorneys for Plaintiff

Duly Verified.

EXHIBIT "A"

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 416216

Robert Williams, Plaintiff, vs. American President
Lines, Ltd., a corporation; The Doe Company,
John Doe and Richard Roe, Defendants.

LONGSHOREMAN'S COMPLAINT FOR
DAMAGES
(Personal Injuries)

Plaintiff complains of defendants and for cause
of action alleges:

I.

That the defendant American President Lines,
Ltd., a corporation, is a corporation existing under
and by virtue of the statutes of a state unknown to
plaintiff, and maintains an office and principal place
of business in the City and County of San Fran-
cisco, State of California, and is subject to and
within the jurisdiction of the above-entitled Court.

II.

That the true names of the defendants sued here-
in as The Doe Company, John Doe and Richard
Roe are presently unknown to plaintiff, and plain-
tiff prays leave to amend this complaint and insert
herein said true names when ascertained.

III.

That during all of the times herein mentioned

defendants owned, managed, operated, navigated, maintained and controlled the SS President Polk and employed and used said vessel in the transportation of freight and passengers for hire in interstate and foreign commerce.

IV.

That on or about January 30, 1952, at or about the hour of 9:30 a.m., plaintiff was employed as a stevedore in the service of a certain stevedoring company, and was engaged in the usual course and scope of his employment aboard said SS President Polk as a business invitee of said defendants. That at said time said vessel was docked at Pier 50-D, San Francisco, California. That plaintiff was working in the lower hold of No. 1 hatch of said vessel.

That at said time and place defendants so carelessly managed, operated, maintained and controlled their said vessel and the gear and appurtenances thereof, and so carelessly and negligently failed to provide proper and adequate locks or other safety devices for securing in place the strongbacks which crossed the hatchway at the level of the shelter deck above the place where plaintiff was working, and so carelessly and negligently provided unsafe and improper loading gear and strongbacks, that by reason thereof, during the course of operations, a strongback was caused to and did fall from its position into the lower hold of said vessel, and did strike plaintiff, by reason whereof plaintiff was caused to and he did sustain serious and grievous physical and bodily injury to his head, back, body and legs, in-

cluding but not limited to injury to plaintiff's right kidney, shock, extensive subdural and perineal hemorrhage, fractures of the transverse processes of the first, second and third lumbar vertebrae, fractured sacrum, fractured pelvis, and other severe injuries.

V.

That said injuries have caused and do now cause plaintiff severe and grievous mental and physical suffering and pain. Plaintiff is informed and believes and therefore alleges that said injuries are permanent in character and that he will continue to suffer pain and injury by reason thereof, all to plaintiff's general damage in the sum of \$250,00.00, no part of which has been paid.

VI.

That at the time of said accident, as aforesaid, plaintiff was gainfully employed as a longshoreman and earning approximately \$100 per week. Plaintiff has been unemployed since said accident until the date hereof, as a direct and proximate result of said injuries, incurred as aforesaid, and has thereby suffered wage loss to his special damage at the above rate, and plaintiff is informed and believes and therefore alleges that he will continue for an indefinite period of time in the future to sustain such wage loss, and plaintiff prays that the full amount of said wage loss, not now known to plaintiff, may be inserted herein, and in all of the records and pleadings of this action, at the time this action comes to trial, and that he may amend his

prayer herein to request reimbursement and compensation for said wage loss in such sum as the proof shall show at the trial.

VII.

That plaintiff was compelled to and he did obtain the services and attention of doctors to treat and relieve him on account of said injuries and has incurred expenses therefor and has suffered special damage as a result thereof. Plaintiff does not know the exact cost of said medical services at the time of filing this complaint and prays leave to amend said complaint or offer proof at the time of trial herein when said expenses are ascertained.

Wherefore, plaintiff prays judgment, etc.

As and for a Second, Separate and Additional Cause of Action against said defendants, and each of them, plaintiff alleges:

I.

Incorporates by reference the same as though set forth in full all of the allegations contained in paragraphs I, II, III, V, VI and VII of the first cause of action herein.

II.

That on or about January 30, 1952, at or about the hour of 9:30 a.m., plaintiff was employed as a stevedore in the service of a certain stevedoring company, and was engaged in the usual course and scope of his employment aboard said SS President

Polk in the service of the said vessel. That at said time said vessel was docked at Pier 50-D, San Francisco, California. That plaintiff was working in the lower hold of No. 1 hatch of said vessel.

That at said time and place defendants carelessly and negligently maintained said vessel, its gear, appliances and appurtenances in an unsafe and unseaworthy condition in that the strongbacks which crossed the hatchway at the level of the shelter deck above the place where plaintiff was working, did not have safe, proper and adequate locks or other safety devices for securing the said strongbacks in place, and in that the loading gear was improper, unsafe and unseaworthy, and that by reason thereof, during the course of operations a strongback was caused to and did jerk, dislodge and fall from its position into the lower hold of said vessel, and did strike plaintiff, by reason whereof plaintiff was caused to and he did sustain serious and grievous physical and bodily injury to his head, back, body and legs, including but not limited to injury to plaintiff's right kidney, shock, extensive subdural and perineal hemorrhage, fractures of the transverse processes of the first, second and third lumbar vertebrae, fractured sacrum, fractured pelvis, and other severe injuries.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$250,000, plus the amount of wage loss sustained and to be sustained by plaintiff, plus the amount of medical expenses incurred by plaintiff and to be incurred,

for costs of suit herein, and for such other and further relief as is just in the premises.

Dated: February 11, 1952.

GLADSTEIN, ANDERSEN &
LEONARD

By LLOYD E. McMURRAY,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

Robert Williams, being first duly sworn, deposes and says:

That he is the plaintiff named in the within and foregoing complaint; that he has read said complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to such matters he believes it to be true.

ROBERT WILLIAMS

Subscribed and sworn to before me this 15 day of February, 1952.

[Seal] AGNES QUAVE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTION TO
DISMISS

To: Plaintiff above named and to Messrs. Treadwell
& Laughlin and Charles M. Haid, Jr., its at-
torneys:

You and Each of You Will Please Take Notice,
that the undersigned will bring the above Motion
on for hearing before this Court, at the Court Room,
United States Court, Post Office Building, 7th and
Mission Streets, San Francisco, California on the
11th day of October, 1954, at 9:30 o'clock a.m., in
the forenoon of that day or as soon thereafter as
counsel can be heard.

BOYD, TAYLOR & REYNOLDS,

/s/ BOYD, TAYLOR & REYNOLDS,

Attorneys for Defendant Marine Terminals Corp.,
a corporation.

MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM

The defendant moves the Court as follows:

1. To dismiss the action because the Complaint
fails to state a claim against defendant upon which
relief can be granted.

Dated: This 4th day of October, 1954.

BOYD, TAYLOR & REYNOLDS,
/s/ BOYD, TAYLOR & REYNOLDS,
Attorneys for Defendant, Marine Terminals Corp.,
a corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 5, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Defendant stevedoring company moves to dismiss a complaint for indemnity brought against it by plaintiff shipowner. Plaintiff was sued in a state court by an employee of defendant who was injured in the course of his employment while unloading one of plaintiff's ships. The complaint in the state court consisted of allegations of negligence and of unseaworthiness of the vessel. The parties to the suit in the state court arrived at a settlement, and now plaintiff seeks recovery of the amount it paid in settlement of the injured person's claim plus plaintiff's expenses in connection with the state proceeding. Plaintiff seeks indemnity on the theory that the sole, active and primary cause of the injury was defendant's negligence in proceeding with the unloading with knowledge of a dangerous condition, without notifying plaintiff or its agents.

Defendant's motion to dismiss is based upon the contention that the action in the state court was

for active negligence, and that plaintiff here is bound by the allegations of active negligence in the state proceeding because it voluntarily settled that action. Defendant cites *Fidelity Casualty Co. vs. Federal Express*, 6th Cir., 136 F.2d 35; but that case is not in point because it was a suit between parties who were co-defendants in a previous suit. That case held that a judgment debtor who pays the judgment against him is bound by the record in the case, at least as to other parties to the suit culminating in that judgment. Plaintiff here was not a judgment debtor in the previous suit, and defendant was not a party to it.

There is in this circuit a nearly exact precedent for the present suit for indemnity: *States S.S. Co. vs. Rothschild International Stevedoring Co.*, 9th Cir., 205 F.2d 253, in which the court reversed the dismissal of a complaint for indemnity brought by a shipowner against a stevedoring company, to recover the amount of a settlement with the widow of the injured man. Therefore it cannot be said that plaintiff shipowner is precluded as a matter of law from showing that defendant's negligence was the sole, active and primary cause of the injury. See also *Davis vs. American President Lines, N.D. Cal.*, 106 F. Supp. 729. Thus defendant's principal contention is without merit and its motion to dismiss is denied.

Defendant also claims that it was prejudiced in some way by the fact that it was not given notice of the suit in the state court, and had no part in the settlement of that suit; but defendant will now

have its day in court in this suit. Nothing was decided as to this defendant by the settlement of the previous suit. Even the amount of the settlement can be assailed if the defendant wishes to do so. Therefore no prejudice to defendant has been shown to have resulted from the settlement between plaintiff and the injured man.

Defendant seeks support for its position in decisions in the second circuit. Apart from the fact that recent decisions in the second circuit recognize a right to indemnity in a case similar to the one at bar, *Berti vs. Compagnie, etc.* 2d Cir., 213 F.2d 397, this Court is bound by the law of the Ninth Circuit as set forth in *States S.S. Co. vs. Rothschild International Stevedoring Co.*, *supra*. The *States* case also disposes of defendant's contention that the case at bar is controlled by *Halcyon Lines vs. Haenn Ship Corp.*, 342 U.S. 282, because the Court of Appeals there held, 205 F.2d at 255, that "* * * the *Halcyon* case has no application to indemnity cases."

It Is Ordered that the motion of defendant Marine Terminals Corporation to dismiss the complaint be, and the same is hereby denied, and defendant is directed to answer the complaint.

Dated: December 8, 1954.

/s/ OLIVER J. CARTER,
United States District Judge

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant, Marine Terminals Corp., a corporation and answering Plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering Paragraph I, said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on the ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraphs IV and VI, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

III.

Answering Paragraph V, from the beginning thereof to and including the words "said action" Line 12, Page 3, said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Further answering Paragraph V, beginning with the words "because of" Line 13, Page 3, through

and including the end of the Paragraph V, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Plaintiff, American President Lines, Ltd., a corporation, has been damaged in the sum of \$67,563 or any other sum or sums whatsoever or at all.

IV.

Denies each and every allegation in Plaintiff's Complaint contained not heretofore specifically admitted.

V.

And as and for a Further, Separate and Affirmative Answer to Said Complaint, this defendant alleges that Robert Williams, who was the Plaintiff in that certain action described and set forth in Paragraph V of the Complaint herein, was at the time of the accident and resulting injuries described and set forth in said Paragraph V of said Complaint herein; was employed by this defendant and alleges therefore that any and all liability of this defendant to any person or persons in any way arising out of said accident or the matters set forth in said Complaint is covered and controlled by the provisions of the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.A. Sections 901 to 950 and that this defendant had secured the payment of compensation thereunder and had fully complied with all the terms conditions of said Act. And as a Further, Separate and Affirmative Answer to said Complaint; this defendant alleges that the negligence and carelessness, if any, causing the

alleged injury to plaintiff was the negligence and carelessness of persons other than this defendant, its agents, servants or employees, and that this defendant, its agents, servants and employees were without fault or negligence in any respect causing or contributing to said injury. And as and For a Further, Separate and Affirmative Answer to said Complaint, this defendant alleges that purported release and settlement obtained and taken by the plaintiff, American President Lines, Ltd., a corporation, was unreasonable in amount and did constitute a voluntary contribution or payment on the part of said Plaintiff, which said unreasonableness of amount and said voluntary payment was further made without any notice thereof to this defendant, and without any opportunity to participate in or defend said action and as a result thereof would not be binding on or upon this defendant to respond by way of indemnity or otherwise.

Wherefore, this defendant, Marine Terminals Corporation, a corporation, prays that Plaintiff's Complaint be dismissed, for defendant's costs in this action incurred and for such further and additional relief as shall seem just and equitable in the premises.

/s/ BOYD & TAYLOR,

Attorneys for Defendant, Marine Terminals Corporation, a corporation.

Duly Verified.

[Endorsed]: Filed December 21, 1954.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

To the Defendant above named and to Boyd & Taylor, its Attorneys:

Please take notice that Plaintiff American President Lines, Ltd., has changed attorneys in the above-entitled action and that Lillick, Geary, Olson, Adams & Charles, 311 California Street, San Francisco, California, have been and are hereby substituted in place of the undersigned as attorneys for plaintiff named.

Dated: January 6, 1955.

/s/ TREADWELL & LAUGHLIN,
Attorneys for Plaintiff American
President Lines, Ltd.

The undersigned hereby consent to the above change of attorneys.

Dated: January 5, 1955.

/s/ TREADWELL & LAUGHLIN,
Attorneys for Plaintiff American
President Lines, Ltd.

/s/ C. R. WADE, Secretary
American President Lines, Ltd.

We agree to be substituted in place of Treadwell & Laughlin in the above-entitled action as attorneys for Plaintiff American President Lines, Ltd.

Dated: January 5, 1955.

LILLICK, GEARY, OLSON, ADAMS
& CHARLES,

/s/ By EDWIN L. GERHARDT

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendants above named and to Boyd and
Taylor, their Attorneys:

Please take notice that the undersigned will bring
the attached Motion to Amend Complaint on for
hearing before the Master Calendar Department of
this Court on Monday, January 24, at the hour of
9:30 o'clock a.m., or as soon thereafter as counsel
can be heard.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,
Attorneys for Plaintiff

MOTION TO AMEND COMPLAINT

Plaintiff American President Lines, Ltd., moves
the Court for leave to amend its complaint on file
herein in the following particulars:

1. Striking out the paragraph beginning line 25,
page 2, and ending line 1, page 3, Paragraph IV,
and inserting in lieu thereof the following:

Notwithstanding such knowledge on the part of defendant as aforesaid, defendant negligently, recklessly, and without regard to the imminent peril to its employees, commenced cargo operations in said hatch. Shortly thereafter, defendant, its agents, servants or employees negligently, recklessly, and improperly maintained and/or controlled winches, gear and other appurtenances, within its control and/or supplied improper or unsafe cargo hooks, bridles, slings and/or other cargo handling equipment causing said hatchbeam to become dislodged and fall into said hatch striking and severely injuring a stevedoring employee of defendant, one Robert Williams, who was working in the course of his employment in said hatch.

2. Striking out the paragraph beginning with line 13 and ending line 19, page 3, Paragraph V, and inserting in lieu thereof the following:

Because of the absolute liability of American President Lines, Ltd., to said Robert Williams based on unseaworthiness and negligence as aforesaid, said action was compromised and settled by and between American President Lines, Ltd. and said Robert Williams on January 6, 1953, for the reasonable sum of \$62,500.00, a full and complete release was taken, and the action was dismissed with prejudice on January 19, 1953.

3. Striking out the paragraph beginning with line 25 and ending with line 31, Paragraph VI, page 3, and inserting in lieu thereof the following:

The sole, active, primary, and proximate cause of the injuries sustained by said Robert Williams

was the negligent and reckless action of defendant Marine Terminals Corporation as aforesaid, whereby plaintiff herein has been damaged in the sum of \$67,563.00, as to which amount it is entitled to be fully indemnified by defendant.

The grounds of this motion are to enable plaintiff to amend the complaint to conform to evidence that will be produced at the time of trial and to allege more specifically defendant's acts of negligence.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,
Attorneys for Plaintiff

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Cause.]

ORDER

This cause came on to be heard on January 24, 1955, on plaintiff's motion for leave to file an amended complaint, and it appearing that justice requires that such leave be given, and the court being fully advised,

It Is Ordered:

1. That plaintiff be given leave to file its amended complaint; and
2. That the answer of the defendant hereto filed to the plaintiff's complaint shall stand as an answer to the allegations contained in the plaintiff's complaint as amended.

Dated: February 3, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge

Approved as to form:

BOYD & TAYLOR,
/s/ By FRED G. NAVE,
Attorneys for Defendant

[Endorsed]: Filed February 3, 1955.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR
INDEMNITY

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is now and at all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and maintaining an office and place of business in the City and County of San Francisco, State of California.

II.

Defendant is now and at all of the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, and is authorized to do and is doing business in the City and County

of San Francisco, State of California, and elsewhere.

III.

On or about January 30, 1952, defendant undertook, as an independent contractor, pursuant to a then existing agreement between plaintiff and defendant, to perform certain stevedoring work aboard the SS President Polk, a vessel owned and operated by plaintiff and carrying passengers and freight for hire in interstate and foreign commerce, said vessel then lying alongside a pier at San Francisco, California.

IV.

Shortly after commencing stevedoring work on said date, defendant ascertained through its agents, servants, and employees the lack and absence of a safety latch on a heavy hatchbeam at No. 1 hatch on said vessel, which condition, if allowed to continue and remain while stevedoring work was being carried on in said hatch, would result in having the stevedores working in a dangerous, unsafe and unseaworthy place due to the imminent danger of said hatchbeam becoming dislodged from its position during cargo handling operations and falling into the hatch.

Plaintiff herein was unaware, not only prior to but at all times mentioned herein and until said hatchbeam became dislodged as hereinafter set forth, that said safety latch was missing from said hatchbeam, nor did defendant herein at any time prior to said dislodgment advise plaintiff of said dangerous, unsafe, and unseaworthy condition.

Notwithstanding such knowledge on the part of defendant as aforesaid, defendant negligently, recklessly, and without regard to the imminent peril to its employees, commenced cargo operations in said hatch. Shortly thereafter, defendant, its agents, servants or employees negligently, recklessly, and improperly maintained and/or controlled winches, gear and other appurtenances, within its control and/or supplied improper or unsafe cargo hooks, bridles, slings and/or other cargo handling equipment causing said hatchbeam to become dislodged and fall into said hatch striking and severely injuring a stevedoring employee of defendant, one Robert Williams, who was working in the course of his employment in said hatch.

V.

On or about April 3, 1952, said Robert Williams brought suit against American President Lines, Ltd., in the Superior Court of the State of California, in and for the City and County of San Francisco, numbered 416216, entitled "Robert Williams, Plaintiff, vs. American President Lines, Ltd., a corporation; The Doe Company; John Doe; and Richard Roe, defendants", seeking recovery of \$250,000 general damages, together with past and future wage loss, medical expenses, and costs of suit. Attached hereto and made a part hereof, marked "Exhibit A", is a true and correct copy of the complaint in said action.

Because of the absolute liability of American President Lines, Ltd. to said Robert Williams based

on unseaworthiness and negligence as aforesaid, said action was compromised and settled by and between American President Lines, Ltd. and said Robert Williams on January 16, 1953, for the reasonable sum of \$62,500.00, a full and complete release was taken, and the action was dismissed with prejudice on January 19, 1953.

Expenses and costs attendant upon defense of said action, and reasonably incurred in connection therewith, together with attorneys' fees reasonably incurred were in the total sum of \$5,063.

VI.

The sole, or active, or primary, and proximate cause of the injuries sustained by said Robert Williams was the negligent and reckless action of defendant Marine Terminals Corporation as aforesaid, whereby plaintiff herein has been damaged in the sum of \$67,563.00, as to which amount it is entitled to be fully indemnified by defendant.

No part of said sum has been paid, and the whole thereof is due, owing and unpaid.

VII.

This is a civil action between citizens of different states, where the amount in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs. Jurisdiction of this court is founded upon the provisions of 28 United States Code, Sec. 1332.

Wherefore, plaintiff prays judgment in the sum of \$67,563.00, together with costs of suit herein, and

for such other and further relief as may be proper in the premises.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,
Attorneys for Plaintiff

Duly Verified.

[Note: Exhibit A is set out at pages 7-12.]

[Endorsed]: Filed February 3, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

This is an action for indemnity in the amount of \$67,563.00. Jurisdiction of this court is founded upon the provisions of 28 United States Code Section 1332. The facts of this case are as follows:

On January 29, 1952, plaintiff's vessel, President Polk, was in San Francisco, and pursuant to a written stevedoring contract the defendant went aboard the vessel for the purpose of discharging the ship's cargo. The contract contained no agreement, covenant or language of indemnity. This fact is undisputed. American President Lines has conceded there was a missing locking device on the No. 2 king strongback in the lower 'tween deck hatch.

During unloading operations the defective strongback was dislodged by the bridle and hook manipulated by the winch driver, and fell into the lower hold causing personal injuries to Mr. Williams, a

stevedore. The operation of the winch bridle and hook was in the usual and customary manner, and the winch driver was free of negligence. The evidence reveals that it is the duty of the shipowner to repair and maintain the locking devices.

An action was brought by the injured man, Williams, against American President Lines. No tender of defense of the action in the State Court was made by the American President Lines to the Marine Terminals Corporation. Further, no third party or indemnity action was filed. In settlement of Mr. Williams' claim American President Lines paid him \$62,500.00.

The question for decision is whether a recovery for indemnity may be had by the American President Lines, the shipowner, against Marine Terminals.

The shipowner's position is that its negligence was passive, and that the proximate cause of Williams' injury was the negligence of Marine Terminals. This contention is based on the fact that the evidence shows that the gang boss and the gang steward knew that the hatch beam was defective when the work began. Therefore it is argued the subsequent damages were due to defendant's independent acts of negligence, supervening in time, in violation of all the safety rules. Plaintiff's brief states that defendant "had the last clear chance to avoid this accident."

If this court had merely the problem of equating the relative liability as between two tort feasons its task would be simple. The evidence clearly shows

that plaintiff's negligence was passive, and that defendant continued its work with knowledge of the dangerous condition. Therefore defendant's share of responsibility would be greater for the damages which ensued.

However, this case is governed by the decision of the Supreme Court in *Haleyon Lines vs. Haenn Ship Refitting Corp.*, 342 U. S. 282. In that case the Supreme Court considered whether it would create an enforceable right of contribution as between joint tort feasons, and stated, "we would feel free to do so here if wholly convinced that it would best serve the ends of justice." The conclusion reached was "that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action."

The court stated in its opinion that certiorari was granted because of the conflicting views taken by the circuits as to the existence of and the extent to which contribution can be obtained in cases such as this. It then cited as cases under consideration *American Mutual Insurance Co. vs. Matthews*, 182 F.2d 322, and *United States vs. Rothschild International Stevedoring Co.*, 183 F.2d 181. It is this court's view that if the instant case were decided under the rule of law enunciated in *U. S. vs. Rothschild Int. Stev. Co.*, *supra*, that plaintiff would be entitled to indemnity. However, the Supreme Court has declared the rule which this court is bound to follow. Under this rule plaintiff must be denied recovery.

The case of *States S.S. Co. vs. Rothschild International Stevedoring Co.*, 205 F.2d 253, indicates the exception to the general rule enunciated by the Supreme Court. That is the situation where the shipowner is liable without fault as a result of another's acts. Indemnity, other than as provided by contract, is allowable where the shipowner is liable only because of its non-delegable duty to furnish a stevedore a seaworthy ship and a safe place in which to work under the doctrine of *Seas Shipping Co. vs. Sierocki*, 328 U. S. 85, a species of absolute liability regardless of fault. The shipowner in the instant case was not liable without fault for he admittedly supplied a beam with a defective locking device. As such, this negligence jointly concurred with the Stevedoring Company's negligence resulting in the ensuing accident. If plaintiff were allowed recovery in this case it would be on basis of contribution rather than on a true indemnity theory.

In accord with *Halcyon vs. Haenn Ship Refitting Corp.*, *supra*, and the above opinion,

It Is Ordered that judgment be entered herein, upon findings of fact and conclusions of law in favor of the defendant. The respective parties to pay their own costs.

Dated: July 12th.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above-entitled cause coming on for trial on the 8th day of June, 1955, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury; Edwin L. Gerhardt and Gordon L. Poole of Lillick, Geary, Olson, Adams & Charles, appearing as counsel for Plaintiff, American President Lines, Ltd., and M. K. Taylor and Frederic G. Nave of Boyd & Taylor, appearing as counsel for the defendant Marine Terminals Corp.; and the court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted to the court for decision and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. On January 29, 1952, plaintiff's vessel, President Polk, was in San Francisco, for the purposes of loading and unloading cargo. That the defendant, Marine Terminals Corporation, pursuant to a written stevedoring contract went aboard for the purpose of discharging the ship's cargo.
2. That the stevedoring contract, between said parties contained no agreement, covenant or language of indemnity.
3. That at the time of the arrival of said vessel

in San Francisco, and prior to the defendant going aboard for the purpose of discharging the vessel's cargo, there was a missing locking device on the number 2 King strongback in the lower 'tween deck hatch.

4. That the plaintiff knew and was aware of the absence of locking devices on some of the strongbacks on the vessel and communicated this information to the defendant.

5. That plaintiff's chief officer had on January 29, 1952, communicated to defendant's walking boss, Ernest Bleile, a warning that some beams aboard the vessel might lack locking devices and cautioned him to remove any defective beams.

6. That at the time of the accident, only one section of the three sections of the lower 'tween deck hatch square was open.

7. That on the second day of the unloading of the cargo of said vessel, the defendant's winch driver, Mr. Paquette, dislodged a strongback by the bridle and hook being manipulated by him in the cargo unloading operations. That upon becoming dislodged said strongback fell into the lower hold striking and causing personal injuries to Mr. Williams, a stevedore employee of the defendant.

8. That the winch driver, Mr. Paquette, had prior to, and at the time of the dislodgement of said hatch beam, been using operating and manipulating the bridle and hook in the usual and customary manner and free of any negligence whatsoever.

9. That the main purpose of locking devices of strongbacks is to prevent the dislodgement of

strongbacks by being caught or hooked by the bridle and hook used in loading and unloading operations.

10. That had said strongback been equipped with a locking device, it would not have become dislodged and in fact could not have become dislodged by the said bridle and hook used in said loading or unloading operations.

11. That it was the duty of the vessel's owners (plaintiff herein) to supply, repair and maintain the locking devices used on said hatch beam.

12. That plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks.

12. That the injured stevedore, Mr. Williams, was an employee of the defendant. That the defendant, Marine Terminals, had complied with the provisions of the Longshoreman and Harbor Compensation Act, and for several months following said accident and resulting injuries received both compensation and medical care, attention and expenses pursuant to the said act.

14. That Mr. Williams later elected to file an action for damages against the vessel's owner (the plaintiff herein) in the State Court of California.

15. That on April 3, 1952, Robert B. Williams filed suit in the Superior Court of the City and County of San Francisco for \$250,000.00 naming American President Lines as defendant for the injuries resulting from his accident of January 30, 1952.

16. That no tender of defense of the action in the

State Court was made by the American President Lines to the Marine Terminals Corporation, nor was any third party or indemnity action filed in said State Court action bringing in or attempting to bring in the Marine Terminals Corporation.

17. That the State Court action filed by Mr. Williams was settled by the American President Lines paying the sum of \$62,500.00 to Mr. Williams, which said settlement and sum was reasonable.

18. That Williams, an employee of defendant, suffered serious permanent injuries to his back and hip joint and suffered a permanent wage loss as the result of his injury.

From the foregoing facts that court concludes as follows:

Conclusions of Law

1. That both of the parties, plaintiff and defendant, were jointly and concurrently negligent in the premises, which joint and concurrent negligence caused the accident and resulting injuries to Mr. Williams, the stevedore.

2. That the joint and concurrent negligence of the said parties consisted of negligence on the part of both of them in that the shipowner knowingly supplied a hatch beam totally lacking a locking device; and both of said parties with full knowledge of said lack of a locking device permitted the unloading and loading operations to be performed, without repairing or replacing said locking device, or without removing said hatch beam.

3. That both parties well knew or should have

known from experience that a hatch beam totally lacking in locking devices could be easily and upon even slight contact with the bridle and hook, used in loading and unloading, became dislodged and fall and cause serious injury to any person upon whom said hatch beam might fall.

4. That the concurring negligence of the ship-owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.

5. Although Mr. Williams' (the stevedore) injuries proximately resulted from the joint and concurring negligence of the ship (plaintiff) the stevedoring company (defendant), plaintiff's demand for indemnity against the defendant must be denied upon the authority of *American Mutual Liability Ins. Co. vs. Mathews*, 182 Fed. 2d, 332, 2 Cir., and *Halcyon Lines vs. Haenn Ship Refitting Corp.*, 342 U.S. 382.

6. That plaintiff is not entitled to recover from the defendant, upon its action for indemnity.

7. That judgment be entered herein, upon these findings of fact and conclusions of law for the defendant.

8. That each party pay their own costs in this action incurred.

Dated: This 1st day of August, 1955.

/s/ MICHAEL J. ROCHE,

Chief Judge, United States District
Court

[Endorsed]: Filed August 1, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 34067

AMERICAN PRESIDENT LINES, LTD., a cor-
poration, Plaintiff,

vs.

MARINE TERMINALS CORPORATION, a corporation, Defendants.

JUDGMENT ON FINDINGS OF COURT
FOR DEFENDANT

The above cause came on for trial on the 8th day of June, 1955, and was duly submitted for consideration and decision, and the Court, after due deliberation rendered its decision, and on the 1st day of August, 1955, made and filed its findings of fact, conclusions of law, and order for judgment.

Now, Therefore, pursuant thereto, it is determined by the Court that plaintiff take nothing by this action and that each party bear its own costs.

Dated: August 1st, 1955.

/s/ MICHAEL J. ROCHE,

Chief Judge, United States District
Court

Acknowledgment of Service attached.

[Endorsed]: Filed August 1, 1955. Entered August 2, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that American President Lines, Ltd., Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 2, 1955.

Dated August 30, 1955.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,

/s/ EDWIN L. GERHARDT,

/s/ GORDON L. POOLE,

Attorneys for Appellants American
President Lines, Ltd.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, American President Lines, Ltd., Plaintiff herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered August 2, 1955, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of

Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of American President Lines, Ltd., Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 30th day of August, 1955.

[Seal] FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,
/s/ By ERBON DELVENTHAL,
Attorney-in-Fact

Notary Public's Certificate attached.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It is hereby stipulated and agreed, by and between the attorneys for the parties hereto, subject to the order of the court, that the time within which plaintiff-appellant shall file the record on appeal and docket the appeal from the judgment entered herein on August 2, 1955, in the United States Court of Appeals for the Ninth Circuit be extended to and including November 28, 1955.

Dated: October 4, 1955.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,

Attorneys for Plaintiff-Appellant

/s/ BOYD & TAYLOR,

/s/ By FREDERIC G. NAVE,

Attorneys for Defendant-Appellee

So Ordered: October 7th, 1955.

/s/ MICHAEL J. ROCHE,

United States District Judge

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant, American President Lines, Ltd. designates the entire record pursuant to Rule 75, Federal

Rules of Civil Procedure, including the reporter's transcript and all exhibits.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,

/s/ EDWIN L. GERHARDT,

/s/ GORDON L. POOLE,

Attorneys for Appellant, American
President Lines, Ltd.

Acknowledgment of Service attached.

[Endorsed]: Filed November 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for Indemnity.

Notice of Hearing and Motion to Dismiss by Defendant.

Memorandum and Order of Court Denying Motion to Dismiss.

Answer of Defendant.

Substitution of Counsel for Plaintiff.

Notice and Motion by Plaintiff to Amend Complaint.

Order Granting Leave to Amend Complaint and for Answer to Stand as Answer to Amended Complaint.

First Amended Complaint for Indemnity.

Memorandum Opinion of Court for Judgment for Defendant.

Proposed Findings of Fact and Conclusions of Law by Plaintiff.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Appeal.

Appeal Bond.

Stipulation and Order Extending Time to Docket Record on Appeal.

Designation of Record on Appeal.

Reporter's Transcript of Trial Proceedings June 8, 9, 10 and 13, 1955.

Plaintiff's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 23 (22 withdrawn on stipulation) and 24.

Defendant's Exhibits A and B.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of November, 1955.

[Seal]

C. W. CALBREATH,
Clerk

/s/ By MARGARET P. BLAIR,
Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 34067

AMERICAN PRESIDENT LINES, LTD.,
Plaintiff,

vs.

MARINE TERMINALS CORPORATION,
Defendant.

TRANSCRIPT OF PROCEEDINGS

June 8, 9, 10, 1955

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Lillick, Geary, Olson, Adams & Charles, by Edwin L. Gerhardt and Gordon L. Poole. For the Defendant: M. K. Taylor and Frederic G. Nave. [1*]

Mr. Gerhardt: If Your Honor please, we have stipulated on the introduction of certain documents into evidence, and for the purpose of the record I should like to recount those exhibits in the order in which they are to be introduced.

Exhibit 1, Your Honor, is the first diagram, a vertical section through the ship, showing the three hatch levels in No. 1 hatch.

(The diagram referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Gerhardt: Exhibit No. 2 is the horizontal section, the bird's eye view of the No. 1 lower tweendeck hatch.

(The diagram referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Gerhardt: Exhibit No. 3 is an illustration of the bridle and hook and the contact it made with the No. 2 strongback at the lower tweendeck level.

(The diagram referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Gerhardt: Exhibit 4, Your Honor, is a photograph taken recently. As a matter of fact, Exhibits 4 through 9 are all recent photographs taken aboard the President Polk at No. 1 hatch for the purpose of illustrating construction of beams, the position of hatchboards, and so forth. [3]

Exhibit No. 4, Your Honor, is a photograph showing the No. 1 hatch, and at the forward end of the hatch the winch driver in place at the controls in a position where he is looking down into No. 1 hold.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Gerhardt: Exhibit No. 5 is a view of the upper tweendeck, or shelter deck hatch, showing the hatch boards in position across the queen beam and resting at either end in the king beams.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Gerhardt: Exhibit No. 6, Your Honor, is a photograph of a typical strongback in No. 1 hatch showing the locking device or safety device on one end of the strongback in an open or unlocked position.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Gerhardt: Exhibit No. 7 is the same strongback from the same side and end showing the safety latch in a locked or closed position.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Gerhardt: Exhibit No. 8 is a view of the same end of the same strongback, but the other side showing the nut and [4] bolt or pin which holds the safety lock in place from the other side.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Gerhardt: Exhibit No. 9, Your Honor, is a photograph showing the slot or cleat at the side of the hatch opening into which the end of the strongback or beam fits.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Gerhardt: Exhibit No. 10, Your Honor, is a photograph also taken on the President Polk on January 30th, 1952 but a few hours after the accident had occurred. This photograph is taken from the maindeck level looking down into the hold, and if I may be permitted to explain that while Your Honor reviews it, and for the record, this area——

The Court: Do you wish to come up here?

Mr. Gerhardt: This area at this side indicates the level of the hatch at the main deck. Then next is the shelter deck or upper tweendeck area with the opening in the beams removed from the first section and from part of the second section, but with both sections of strongbacks, the No. 1 section and the No. 2 section of the strongbacks removed.

The next level in the photograph is the lower tweendeck showing the barrels of oil stowed in the wings or at the side of the tweendeck space, showing the No. 2 strongback out of [5] the slot, and only the open slot or cleat on the side of the hatch.

No. 3, the queen beam still in place but with the hatchboards having been removed from the second section between No. 2 and No. 4.

The Court: This is the king and this is the queen?

Mr. Gerhardt: What you are pointing to are some dunnage boards in the lower hold, but the king beam was located here, and then the hatchboards rested on the edge here beneath, in the side of that king beam to the top of the queen and over this king beam, which is No. 4.

Then the next level, Your Honor, showing the

drums on the lower hold itself where Mr. Williams was working at the time.

The Court: Is this one shot?

Mr. Gerhardt: That is one shot.

(The photograph referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

The Court: Any questions?

Mr. Taylor: No. It is our understanding that picture was taken the day of the accident some time later.

Exhibit No. 11, Your Honor, is a report from the Pacific Maritime Association with respect to the hours' work and the earnings of Robert Williams per quarter beginning in 1950, January 1st, and ending on May 29th of 1955.

The Court: It will be admitted and marked. [6]

(The report referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Gerhardt: Plaintiff's Exhibit No. 12 is the record of St. Mary's Hospital, which was subpoenaed, and which was left with counsel and with the clerk this morning pursuant to stipulation.

(The hospital record referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Gerhardt: Exhibit No. 13 is an x-ray bill in the amount of \$46.50, which was paid directly by Mr. Williams and not by his employers, Marine Terminals Corporation.

(The x-ray bill referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 13.)

Mr. Gerhardt: Exhibit No. 14 is the hospital bill showing the proportion to be paid by the compensation insurance carrier for Marine Terminals and the part to be paid by Mr. Williams, his proportion being \$139.60, and the insurance company's proportion being \$1,608.15.

The Court: That is marked what?

The Clerk: 14.

(The hospital bill referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. Gerhardt: No. 15 is a medical bill of Dr. Rodney A. Yoell, who treated Robert B. Williams, and which bill is in [7] the amount of \$266.75, and which was paid directly by Robert B. Williams.

(The medical bill referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Gerhardt: Exhibit No. 16 is the stevedoring contract between American President Lines, the plaintiff, and the Marine Terminals Corporation, the defendant, dated September 30th, 1950, and in effect at the time this accident occurred.

(The contract referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. Gerhardt: Your Honor, there is one further offer which I wish to make at this time. I have here

the Pacific Coast longshore agreement covering the period between 1951 and 1953 and the copy of the Pacific Coast Marine Safety Code dated 1949 which was referred to in the Pacific longshore agreement, and which was effective at the time of this accident on January 1952. We have discussed this matter, Your Honor, from the standpoint of the necessity of subpoenaing some official or representative to testify that those are the agreements and that those agreements were in effect. I understand Mr. Taylor has no objection to stipulating to that extent. Is that correct?

Mr. Taylor: That is correct, Your Honor. Our objection is not based on the failure to lay a foundation. Our objection [8] is they are irrelevant, incompetent and immaterial. I would like to explain that a little further. It is our position that the legal liability of the defendant and the plaintiff toward the stevedore himself is defined by law and not defined by laws that are set down here, and I do not think the rules are the exclusive guides to be followed by Your Honor, and that is the reason for our objection. It is not based upon the basis of the fact. We will stipulate that those are in existence and they would be properly identified.

The Court: Let them go in for purposes of identification to be used by either side. That will give both sides an opportunity to protect the record.

(The agreement referred to was thereupon marked Plaintiff's Exhibit No. 17 for identification.)

(The Safety Code referred to was thereupon marked Plaintiff's Exhibit No. 18 for identification.)

Mr. Gerhardt: We have one or two further stipulations, Your Honor, not covered by documents. It has been stipulated between counsel that the compensation carrier for Marine Terminals Corporation pay the following amounts: \$490 to Robert B. Williams in compensation and \$1,991.90 in medical expenses up to the date when Robert B. Williams filed his notice of election to sue American President Lines, at which time the compensation payments were stopped. That is subject to some further correction, Your Honor, but those are the [9] figures Mr. Taylor has furnished me to date, and we are accepting those for that purpose at this time.

Mr. Taylor: So stipulated, Your Honor.

The Court: Subject to correction, let them be admitted and marked next in order.

Mr. Gerhardt: Then, Your Honor, we have stipulated that the plaintiff American President Lines was incorporated under and by virtue of the laws of the State of Delaware; that the defendant Marine Terminals Corporation was incorporated under and by virtue of the laws of the State of Nevada.

Mr. Taylor has also asked me to stipulate, and I agreed to do so, that when Mr. Williams filed his suit in the State Court against the American President Lines, American President Lines did not in turn make demand upon Marine Terminals Corporation to come in and defend that suit. We still

have a question between us as to the notification to Marine Terminals regarding the settlement, but so far as the written demand to them to come in and defend the suit is concerned, it is stipulated that that was not made.

The Court: Let the record so show.

Mr. Gerhardt: Have you any other documents, Mr. Taylor?

Mr. Taylor: Not at the present time.

Mr. Gerhardt: We are ready to proceed.

The Court: Is there any other stipulation that you might enter into? [10]

Mr. Taylor: No, we stipulated to the items mentioned by counsel.

The Court: Very well. Let the record so show.

Call your first witness.

Mr. Gerhardt: Call Mr. Williams.

ROBERT B. WILLIAMS

called as a witness on behalf of the plaintiff, and, being first duly sworn, testified as follows:

Examination by the Court

Q. What is your full name?

A. Robert B. Williams.

Q. You will have to speak up loud enough so the reporter will be able to hear you and the attorneys on both sides. Sit back in the chair. Where do you live?

A. 3106 Tremont Street, Berkeley.

Q. Your business or occupation?

A. Longshoreman.

(Testimony of Robert B. Williams.)

Q. How long have you been so engaged?

A. For about ten years, better than ten years.

Q. All that time here?

A. Yes, Your Honor.

Q. Did you work in any other port?

A. No, I have not.

The Court: Take the witness. [11]

Direct Examination

Mr. Gerhardt: Q. Are you married, Mr. Williams? A. Yes, I am.

Q. How long have you been married?

A. For about eleven years.

Q. Do you have any children?

A. Yes, I do.

Q. How old are they?

A. I have a daughter that is past 10.

Q. Any other children?

A. We adopted a foster child.

Q. And how old is he or she?

A. She is past 11.

The Court: Q. Pardon me. How long have you been in California? A. Since April 1945.

Q. Where did you live formerly?

A. Texas.

Q. What is your business or occupation here, if any? A. A presser.

Q. You went to school up to what age?

A. Ninth grade, Booker T. Washington, Wichita, Texas.

Mr. Gerhardt: Q. Mr. Williams, on January

(Testimony of Robert B. Williams.)

30th, 1952, were you part of a stevedoring gang engaged in operations aboard the President Polk docked in San Francisco? [12] A. Yes.

Q. What was your job at that time?

A. We were loading drums, working in the lower hold of the President Polk.

Q. What lower hold, do you remember?

A. No. 1.

Q. What kind of drums were you loading?

A. They were oil drums.

Q. Do you know about how many pounds or what their weight was? A. No, I do not.

Q. How were these drums being loaded? That is, what method was used? What bridle arrangement? Mr. Williams, let me call your attention to our Exhibit No. 3, showing a bridle with a loop at one end and a hook part way up the bridle. Would you say that is approximately the type of bridle you were using at the time? A. Yes.

Q. How was that used, Mr. Williams? How do you fasten it around the drums or take it off the drums after they have been loaded?

A. The winch driver, he hoists four drums from the dock to the hold. There are two slings similar to the one that is on the map there.

Q. When you say two slings, I take it you mean from one [13] set of falls there is an arrangement whereby two of these bridles are suspended?

A. Correct.

Q. Go ahead.

A. There are two men that are attached to the

(Testimony of Robert B. Williams.)

dock. They wrap one sling around two drums and the other sling around two more drums and the winch driver, when he gets the signal from the dock, hoists them up into the hold, where four men unhook them.

Q. When you say he puts them around the drums, I take it you mean after placing it around the drums he hooks this loop over the hook on the bridle? A. Yes.

Q. By the way, you were in the No. 1 lower hold yourself? A. Yes.

Q. Do you remember who your partner was?

A. A fellow by the name of Carl Smitty.

Q. Do you remember who the other men down there were? A. No, I do not.

Q. When the drums were lowered, then, you and Smith were a team and as a team you would unhook the bridle from the drums, is that correct?

A. Yes.

Q. Do you recall about how many of these drums had been unloaded before your accident? [14]

A. I have no recollection of how many.

Q. Will you tell the Court what happened at the time you were injured?

A. I myself proceeds to unhook the two drums that had been lowered into the lower hold of the President Polk, No. 1 hatch. I attempts to steady the bridle. The winch driver sits back on the levers. He goes ahead, and before I know anything the hook that is on that cable hooked into the beam, and before I knew anything the beam had struck me.

Testimony of Robert B. Williams.)

Q. When you said the hatch driver goes ahead, you mean he raised the bridle?

A. After the bridle had been released from the two drums.

Q. Do you know who the winch driver was?

A. No, I do not.

Q. Was he a member of your same gang?

A. Yes.

Q. He was a member of the gang sent aboard by Marine Terminals Corporation? A. Yes.

Q. Did you actually see the hook catch in the beam? A. No.

Q. When did you first notice the beam falling?

A. It made a noise—when the hook hit the beam, he made a noise. I looked. I attempt to jump and the beam hit me. It happened just that quick.

Q. Do you know which end of the beam hit you or what part of the beam?

A. The ship was facing—it would be the left side of the beam.

Q. The left side of the beam facing forward?

A. Yes.

Q. Or aft?

A. The ship—the bow was headed toward the Bay.

Q. When did you first go aboard the President Polk?

A. The 30th, I think. I am not sure.

Q. With respect to the day of your accident, had you gone aboard that morning for the first time or had you been aboard the day before?

(Testimony of Robert B. Williams.)

A. The first time was that morning, the day I got hurt.

Q. When you went aboard, Mr. Williams, did you and your gang have anything to do with the removal of any of the strongbacks or the hatchboards?

Mr. Taylor: Your Honor, we will object to what anybody else might have done unless it was done in the presence of Mr. Williams.

Mr. Gerhardt: Q. Did you or anyone in your presence while you were aboard that morning remove any strongbacks or hatchboards in order to get into one hold or the other?

A. Not that I can recall.

The Court: Q. Pardon me. What time did you go aboard [16] the ship?

A. We turned to at 8:00 o'clock, Your Honor.

Mr. Gerhardt: Q. This accident was about what time?

A. Between 9:30 and 10:00 o'clock.

Q. What did you do right after you went aboard, do you remember?

A. We had to secure some oil drums which were upon the next deck above us.

Q. Mr. Williams, will you come down to this blackboard, please.

The Court: Is he familiar with the diagram?

Mr. Gerhardt: I have not shown it to him. I do not believe he is.

The Court: I think it would be well to familiarize him with the diagram.

(Testimony of Robert B. Williams.)

Mr. Gerhardt: Q. Mr. Williams, this vertical section showing the main hatch opening, the shelter deck or upper tweendeck opening, the lower tweendeck opening and the lower hold. Will you point out on the diagram where you were securing these drums of the cargo?

A. There (indicating).

Mr. Gerhardt: With counsel's and the Court's permission, I will mark that W-1.

The Court: Let the record so show.

Mr. Gerhardt: Q. While you are down in this position, [17] Mr. Williams, would you point out to the Court where you were working at the time you were struck by this strongback?

(Witness complied.)

Mr. Gerhardt: I will mark that with an X and W-2.

Q. Now, Mr. Williams, let me call your attention to Plaintiff's Exhibit No. 2, which is a horizontal section or bird's eye view looking down into the tweendeck space, showing the No. 1 strongback removed, and the first section of hatchboards and the No. 2 strongback still in place. Was that the situation and condition that existed while you were working in the lower hold at the time of this accident?

Mr. Taylor: I think that is too leading.

The Court: If he knows, he may answer.

A. Yes.

Mr. Gerhardt: Q. Mr. Williams, on Exhibit 1 we have marked the position where you state you were

(Testimony of Robert B. Williams.)

securing some oil drums in the lower tweendeck. Under whose orders or instructions were you doing that work? A. The gang steward.

Q. What did you do? Where did you move the drums or how did you secure them?

A. We removed them by spreading them out. They appeared to be in a sort of bunch, like, and we placed dunnage, secured them with a rope.

Q. Were they out on hatchboards or were they off in the wing [18] in the lower tweendeck?

A. They were, I would say, within a foot of the coaming in the wing.

Q. In the wing within a foot of the coaming?

A. Yes.

Q. You received orders from the gang steward to proceed to move these drums and secure them in place? A. Yes.

Q. What was the reason for that?

A. Because they were unsafe. They were too close to the hatchcoaming. After protesting with the walking boss——

Q. What do you mean by protesting with the walking boss?

A. He didn't approve of us removing them? I think he accused us of slowing the operation.

Mr. Taylor: Your Honor, I object to this as being hearsay and ask that it go out.

The Court: It may go out.

Mr. Gerhardt: Q. How long did it take to move those oil drums?

Testimony of Robert B. Williams.)

A. Between 35 and 40 minutes.

Q. After you finished securing those oil drums in the wings of No. 1 lower tweendeck, where did you go?

A. We went in the lower hold and proceeded to loading oil drums.

Q. And that is what you were doing at the time the bridle [19] caught on No. 2 strongback in the lower tweendeck hatch and dropped it into the hold, is that right?

Mr. Taylor: I think that is assuming something not in evidence. I will object to it on that ground.

Mr. Gerhardt: I think he has already answered that, counsel.

The Court: Just a moment. The objection will have to be sustained.

Mr. Gerhardt: Will you read that question?

(Question read.)

The Witness: Yes.

Mr. Taylor: Just a minute. I will move that the answer be stricken pending a ruling on the objection.

The Court: Reframe the question. I will sustain the objection.

Mr. Gerhardt: Q. After you secured the drums in the lower tweendeck, Mr. Williams, where did you go?

A. We went to the lower hold, down in the lower hold.

Q. What were you doing in the lower hold?

(Testimony of Robert B. Williams.)

A. Loading drums.

Q. Do you know how many drums you loaded?

A. No, I don't know how many we had loaded, but there were quite a few of them.

Q. What were you doing at the exact time of the accident?

A. I was unhooking two drums that the winch driver had [20] lowered into the hold.

Q. Those were two of the drums that you and your partner were placing in the lower hold, is that right? A. Yes.

Q. After you had unhooked the bridle, what did you do?

A. I attempted to steady the sling.

Q. Did you steady it?

A. I steadied it a little bit. I made the best effort I could.

Q. Then what did you do?

A. I attempted to look up, and when I attempted to look up, at the same time that I looked up the hook had hit the beam and the beam fell, striking me.

Q. Were you removed from the hold?

A. Yes.

Q. Where were you taken?

A. Harbor Emergency; from there to St. Mary's Hospital.

Q. Were you unconscious at any time?

A. No.

Q. Do you know where you were in that hold

Testimony of Robert B. Williams.)

with relation to the beam that fell? Were you near it? A. I was near it.

Q. How were you removed from the vessel?

A. They have a safety basket on most of the docks, and when you get hurt you are placed in this safety basket to the dock [21] and to a waiting ambulance.

Q. You were taken first to Harbor Emergency?

A. Harbor Emergency.

Q. How long were you there?

A. I was there some 45 minutes.

Q. What injuries did you sustain? What part of you hurt at the time?

A. My left side of my hip here, the small portion of the back, close to the spinal cord. At the time that I got hurt, I didn't know what it was. All I know, I couldn't move. I was in severe pain, and later on I learned from the doctor——

Mr. Taylor: We will ask that that be stricken as hearsay.

Mr. Gerhardt: We will prove through the doctors the injuries, Your Honor.

Q. When you were taken to St. Mary's Hospital, were you placed in bed? A. Yes, I was.

Q. Then what treatment were you given there?

A. First they gave me some kind of a shot to sort of calm my nerves. Later on they gave me heat treatments, and seven days later I was placed in a cast.

Q. What kind of a cast?

A. It was a plaster cast.

(Testimony of Robert B. Williams.)

Q. What parts of your body? [22]

A. From my hips all the way around up to the top of my chest.

Q. How long did you keep that on?

A. Nearly four months.

Q. How did you feel during that period?

A. Very uncomfortable.

Q. Where? What parts of your body?

A. My hip, pelvis, my vertebrae, my leg, I could hardly move.

Q. Which leg, Mr. Williams?

A. The right one.

Q. Were you in bed all that four months' period? A. Yes, I was practically.

Q. When you first got out of bed were you able to walk?

A. When I first got out of bed, he didn't permit me to get out of bed immediately after the cast was removed. I was permitted to sit alongside the bed and swing my feet, and I was given therapy treatments. The instructor informed me to take what exercises I could in bed in order to enable me to walk.

Q. Did you perform this exercise?

A. I did.

Q. What were the consequences of performing those exercises? How did you feel in doing that?

A. I felt pain in my hip.

Q. Any place else? [23]

A. My back.

Q. Any place else?

Testimony of Robert B. Williams.)

A. No, those are the only ones.

Q. How long a period of time did you perform those exercises?

A. For about a month.

Q. Then were you able to get out of bed, on crutches, in a wheel chair, or just what did you do then?

A. From the wheel chair to crutches.

Q. By the way, this period of time that you were in a wheel chair, how long was that?

A. I can't quite recollect.

Q. When you went from the wheel chair to the crutches, what was your physical condition at that time? How did you feel?

A. I still had severe pain in my hip, pelvis, that bothered me.

Q. What kind of a pain was that? Was it constant?

A. It was a constant pain. I can't quite explain how it felt. It was like someone would punch you with a pair of pliers, come down, get a hunk of meat and squeeze it.

Q. How long were you on the crutches?

A. I don't know how long I was on the crutches.

Q. Were you still on the crutches when you were released from the hospital? A. Yes.

Q. When you were released from the hospital, did you go home? A. Yes.

Q. Do you remember the date when you were able to discard the crutches?

A. No, I do not.

(Testimony of Robert B. Williams.)

Q. Did you use any other device after the crutches? A. A cane.

Q. Do you remember how long you used the cane? A. No, I do not.

Q. Will you describe to the Court your condition while you were using the cane?

A. My condition while I was using the cane?

Q. Yes.

A. I still had the pain in my hip at the time that I was using the cane.

Q. How about the back?

A. I would get pains occasionally in the back.

Q. When would those come on, Mr. Williams?

A. Mostly in the afternoon when I would get ready to retire to bed.

Q. How long would they last?

A. For a period of two or three hours.

Q. How about sleep? Did you sleep soundly every night, or what was the situation?

A. Not every night, because Dr. Yoell had to give me some [25] liquid medicine for my nerves.

Q. You were under the care of Dr. Yoell during that period, were you? A. Yes.

Q. How often did you take this medicine?

A. I can't recall just how often it was.

Q. Were you given any other medication or pills? A. No.

The Court: Q. Do you know how long you were in the hospital? A. Yes.

Q. How long? A. Four months.

Mr. Gerhardt: Q. When were you able to return to work the first time?

(Testimony of Robert B. Williams.)

A. I was off 14 months. I am not positive, but I think it was April 6th when I returned to work.

Q. Of 1953? A. 1953.

Q. Did you feel like going back to work at that time? A. No, I didn't, but conditions——

Q. What do you mean by "conditions"?

A. I have a wife and daughter to support and I had pending bills, paying for my home.

Q. Did you work steadily after that? [26]

A. No, I did not.

Q. How long did you work?

A. Well, the best of my recollection is something like two or three days a week, and then I would have to take off.

Q. How long did you take off?

A. Three to four days; sometimes a week.

Q. Over what period of time did that last?

A. That still last as of now. Occasionally I have to take off on account of my health.

Q. What do you mean, on account of your health, Mr. Williams? A. My injury.

Q. How often do you have to take off?

A. Well, it is practically every week. I take from three to four days off.

Q. Prior to the time of this accident were you working steadily during the week?

A. Before I got hurt?

Q. Yes. A. Yes.

Q. Are you doing the same type of work now that you did before the accident?

(Testimony of Robert B. Williams.)

A. No, I am not working on any ships any more. I am working in cars on the dock.

Q. How does that type of work differ from the shipboard work? [27]

A. It is safer. You don't have objects swinging over your head. It is lighter work. There is more of a rest period involved, which helps.

Q. What about lifting weights? Do you have as much of that to do?

A. Yes, practically as much.

Q. Practically as much lifting?

A. Yes.

Q. How about the climbing?

A. There is no climbing involved at all.

Q. How do you feel today, Mr. Williams?

A. My hip still bothers me on a change of weather.

Q. Where does your hip bother you?

A. In the fat part, in the back, I would say.

Q. On the right side?

A. On the right side.

Q. How does that bother you, Mr. Williams?

A. There is a sort of an ache involved.

Q. How often does that come on?

A. Practically every week.

Q. How long does it last?

A. Until I retire to bed. Lots of times I have to get in bed in order to get relief.

Q. Did you take any medication for that now?

A. None other than hot baths occasionally and rest. [28]

(Testimony of Robert B. Williams.)

Q. What other complaints do you have about your present condition?

A. I can't sit long on something hard, and when I do, I am moving from one side to the other in order to get relaxation. I can't sit in one spot and drive an automobile any length of distance.

Q. Why is that? What complaint do you have about driving?

A. It is because I am tired across the back here, the muscles in the lower part of my back, the coccyx bone and pelvis aches.

Q. When does that come on, if you do any driving or sitting?

A. For instance, when I get ready to take a trip, which we usually do sometimes, or riding on a Sunday during the afternoon, that is when I am usually bothered, and if I attempt to do any strenuous work around the house, such as landscaping, picking and digging, it bothers me.

Q. What other complaints do you have?

A. Occasionally my nerves get on edge and I have to retire or relax to bed—retire to the bed.

Q. Has there been any change at all in your marital relations with your wife?

A. Yes.

Q. To what extent?

A. Well, sometimes I just get nervous and I can't stand noise. It bothers me. [29]

Q. How about your sleeping habits? Have those changed any?

A. Slightly.

Q. To what degree or extent?

A. It is just hard to rest on account of my ner-

(Testimony of Robert B. Williams.)

vous condition. It makes it quite difficult at times to rest, but I usually try to force myself because I know it does me good.

Q. You were how old at the time this accident occurred?

A. 30, I think, or 31.

Q. Have you ever had any prior accidents or injuries of any serious consequence?

A. Before the accident?

Q. Before this occasion in January 1952?

A. No.

Q. How was your health prior to that time?

A. I was in perfect health before I got hurt.

Q. Was there any limitation on any of your activities? A. Before the activities?

Q. Yes. A. No.

Q. What kind of activities could you engage in at that time?

A. Practically anything from shoveling, bulky cargo, lifting heavy objects, as rough as it comes.

Q. Did you engage in any sports?

A. Yes.

Q. What? [30]

A. Swimming, weight lifting, a little shadow boxing.

Q. Do you still do that? A. I can't.

Q. How about the swimming?

A. Occasionally I will try.

Q. How about the weight lifting?

A. No weight lifting at all.

(Testimony of Robert B. Williams.)

Q. Mr. Williams, were you a regular member of this gang that was aboard the President Polk on January 30th, 1952?

A. No, I was not.

Q. What were you? A. A plug man.

Q. What is a plug man?

A. A plug man is a guy that goes to the hall from day to day to get his jobs. A gang man is a man who works in the gang and calls his boss or the hall for orders.

Q. On this particular occasion when you went aboard the President Polk, your tab had been selected and you went with this gang aboard, is that right? A. That is true.

Q. Did you make any inspection when you went aboard of the strongback safety latches or locking devices?

A. No, I did not. The only inspection I made pertained to the oil drums up above.

Q. You mean the oil drums in the wings of the lower tweendeck? [31] A. Yes.

Q. Is the inspection of the strongback locking device part of your duties?

A. Yes, it is part of my duties.

Q. Do you have to be instructed to do that or is it part of your regular duties to inspect the safety latches on the strongback?

Mr. Taylor: That has been asked and answered, Your Honor.

(Testimony of Robert B. Williams.)

Mr. Gerhardt: Just a minute. The witness misunderstood the question.

The Court: Let it all go out. Reframe the question and start over.

Mr. Gerhardt: Q. Was it part of your duty to secure the oil drums in the tweendeck wings or were you instructed to do that?

A. I was instructed to do that.

Q. Was it part of your duty to make any inspection or were you instructed to make an inspection?

Mr. Taylor: Of what, counsel?

Mr. Gerhardt: Of anything.

Mr. Taylor: I think it is pretty general. I will object to it on that ground.

Mr. Gerhardt: Q. Were you instructed to make inspections [32] of the strongbacks? A. No.

Q. Is that part of your work, to make inspections of the strongbacks?

Mr. Taylor: That has been asked and answered.

Mr. Gerhardt: No, it has not. It went out.

Mr. Taylor: I do not believe it did.

The Court: I struck it out and told him to reframe his question.

Mr. Taylor: May we have the reporter read the record?

The Court: That went out.

Mr. Taylor: I am specifically directing the Court's attention to the answer in which he said

(Testimony of Robert B. Williams.)

it was his duty to inspect the strongbacks. Did that go out, too, Your Honor?

The Court: Yes.

Mr. Gerhardt: Q. At the time you were aboard the President Polk, Mr. Williams, what were you called? Were you called a watchman? Were you a steward? Were you a hold man, or what were you called? A. A hold man.

Q. A hold man? A. A hold man.

Q. You were not gang boss? A. No.

Q. You were not a walking boss? [33]

A. No.

Q. You were not a winch driver? A. No.

Q. Or a hatch tender? A. No.

Q. You handled cargo in the hold?

A. Handled cargo in the hold.

Q. Did any hatchboards or hatch covers fall when this strongback fell? A. No.

Q. Did you notice what the position or condition of those hatch covers was after the accident?

A. Yes, I could look up because I was laying on my side in the hold after it struck me.

Q. Where were they?

A. They were hanging down over my head like leaves on a tree or limbs.

Q. Were they still in the No. 1 lower tweendeck space? A. Yes.

Q. Were they resting on any beam or could you tell how they were hanging there?

(Testimony of Robert B. Williams.)

A. They were resting on the queen, the center beam there.

Q. Let me count this for you, Mr. Williams. No. 1 beam had been removed, is that right? A. Yes.

Q. No. 2 strongback was still in place?

A. Yes.

Q. No. 3 strongback was still in place?

A. That is the one that the hatches were resting on.

Q. After No. 2 strongback——

A. ——had fell.

Mr. Gerhardt: May I have a moment, if Your Honor please?

The Court: Certainly.

Mr. Gerhardt: Q. Mr. Williams, you filed an action against American President Lines for your injuries aboard the President Polk, is that right?

A. Yes.

Q. Did you make a settlement of that suit and your claim against the American President Lines?

A. Yes.

Q. Mr. Williams, I will hand you a release which is dated January 16th, 1953 and ask you if that is your signature.

A. Yes, that is my signature.

Q. That is the release you signed at that time?

A. Yes.

Mr. Gerhardt: I will ask Your Honor that this be admitted as Plaintiff's next in order.

The Court: Let it be admitted and marked next in order.

Testimony of Robert B. Williams.)

(The release referred to was thereupon received [35] in evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Gerhardt: Q. Mr. Williams, I hand you an American President Lines, Ltd. check in the sum of \$62,500, payable to Robert Williams and Gladstein, Andersen and Leonard as attorneys and ask you if that is your signature on the back of the check?

A. Yes, that is my signature.

Q. That is your endorsement, is it?

A. That is my endorsement.

Mr. Gerhardt: I will ask that that be admitted.

The Court: Let it be admitted and marked.

(The check referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 20.)

Mr. Gerhardt: Q. Mr. Williams, have you any other complaints with respect to your physical activities and your physical condition other than the ones that you have told me about this morning?

A. No.

Mr. Gerhardt: You may cross-examine.

Cross Examination

Mr. Taylor: Q. As I understand it, Mr. Williams, you have told us all of your physical complaints that you received in this accident?

A. To the best of my ability.

Q. I understood that you were called a plug

(Testimony of Robert B. Williams.)

man on this gang [36] on the day of the accident, is that right? A. Yes.

Q. Was the 30th day of January 1952 the first day you had been with that gang?

A. Yes.

Q. And you were with them that day as a plug man? A. Yes.

Q. I believe you said on the morning of the 30th day of January 1952 you did not make any inspection of the strongback? A. No.

Q. You made no inspection, is that right?

A. No.

Q. You knew from your past experience as a plug man that strongbacks were the beams that went athwartships at the holds? You knew that from your past experience as a longshoreman, didn't you? A. Yes.

Q. And you knew that they had locks on them, is that right? A. Yes.

Q. Was the inspection of the locks on those strongbacks part of your duties as a plug man?

A. It is a part in a certain sense. It is the responsibility of the steward and the gang.

Q. Disregarding the steward and other people, it is part of [37] your duty to be safety conscious, too, is it not? A. Yes.

Q. You say you made no inspection of the strongbacks in that lower hold when you were in the lower hold on the morning of the accident?

A. No.

Testimony of Robert B. Williams.)

Q. Did you look up at all and observe whether or not there were any locks on the strongback?

A. No.

Q. When you were in the lower hold in the position that you have marked "W-2", Mr. Williams, how many people were down there at the time of the accident?

A. There were four of us.

Q. Four of you? A. Yes.

Q. All members of the same gang?

A. No.

Q. Was there another gang working in the lower hold?

A. No—yes, they were members of the same gang but there were two plug men, myself and my partner.

Q. You do not know the names of the other two men who were down there?

A. Not at present, no.

Q. Was there any other gang working in the lower hold at the time you were injured? [38]

A. There was a gang up in the next deck working.

Q. Yes, but with reference to the lower hold—

A. No, we were the only gang that were in the lower hold.

Q. I believe you said that no hatch boards fell?

A. Not that I know of.

Q. And you were not struck by a hatch board?

A. No.

(Testimony of Robert B. Williams.)

Q. This king beam—I think you described it as a king beam, the one that struck you——

A. King or queen.

Q. There is a distinction between them, is there not? A. Yes.

Q. Do you know which it was that fell on you, whether it was a king or a queen beam?

A. I can show you the one.

The Court: Go down and point it out.

Mr. Taylor: Just your recollection on the morning of the accident.

The Witness: This is the beam here that came out of place when the hook hit it (indicating).

The Court: Q. That is a king beam, is it not?

A. King—King or queen, I'm not positive, Your Honor.

The Court: Counsel?

Mr. Taylor: Yes, Your Honor.

The Court: That is a king beam, is it not? [39]

Mr. Taylor: That would be a king beam, yes. That strongback No. 2 would be a king beam.

Q. Did you look at the king beam or the beam that struck you after it struck you to determine what the condition was of the locks?

A. I couldn't. I just looked around at the beam. I knew that it was a beam that struck me. I couldn't get up. I couldn't move.

Q. So you couldn't tell whether it had locks or didn't have locks?

A. No, I could not.

Mr. Taylor: Does Your Honor wish to take a recess?

The Court: Very well, we will recess.

(Whereupon a recess was taken until 2 p.m. this date.) [40]

ROBERT B. WILLIAMS

resumed the stand.

Cross Examination—(Continued)

Mr. Taylor: Q. Mr. Williams, I believe you stated this morning that the day of your accident was your first day aboard the President Polk, is that correct? A. I think so.

Q. You say you did not work on the President Polk on January 29th, the day before the accident?

A. Not that I can recall.

Mr. Taylor: Do you have the deposition that was taken, counsel? Page 9, lines 14 through 16.

Q. Will you read to yourself, Mr. Williams, on page 9—

Mr. Gerhardt: If Your Honor please, may I ask counsel to refresh Mr. Williams' recollection regarding the date that this deposition was taken before he reads the deposition?

Mr. Taylor: Your Honor, for the purpose of the record, the deposition of Robert Williams was taken in the Superior Court action October 7th, 1952, and at that time he was represented by Gladstein, Andersen and Leonard, and the American President Lines were represented by Treadwell and Laughlin, Mr. Haid being of counsel.

The Court: This deposition was taken when?

(Testimony of Robert B. Williams.)

Mr. Taylor: October 7th. [41]

The Court: Where?

Mr. Taylor: At the offices of Treadwell and Laughlin, Mills Tower, 220 Bush Street, San Francisco.

The Court: Do you remember that? In other words, when you were examined?

The Witness: Would you restate that, please?

Mr. Taylor: Q. Your attorney was Mr. Lloyd McMurray of the firm of Gladstein, Andersen and Leonard, is that correct? A. Correct.

Q. Did Mr. McMurray go with you to 220 Bush Street, the offices of Treadwell and Laughlin, for the purpose of your deposition being taken?

A. Yes.

Q. Do you recall that? A. Yes.

Q. At that time you were under oath?

A. Yes.

Q. I will refer to that same deposition.

Mr. Gerhardt: Page 9, line 14, you said, counsel.

Mr. Taylor: Go back to line 10.

The Court: Read that. Familiarize yourself with it. He is going to cross-examine you on it.

Mr. Taylor: Q. Will you read from line 10 down through line 16?

The Court: Read that to yourself. He is going to examine [42] you in relation to that.

(The witness did as requested.)

The Court: Q. Did you read that?

A. Yes.

Mr. Taylor: Q. Mr. Williams, were those ques-

(Testimony of Robert B. Williams.)

Questions asked you and those answers given by you at that time at that deposition?

A. I don't quite have a clear recollection of that.

Q. You say you do not recollect——

The Court: He says he doesn't have a clear recollection of that.

Mr. Taylor: May I read this, Your Honor?

The Court: Yes.

Mr. Taylor: (Reading) "Q. When you went to the President Polk to go to work——"

We might as well fix those dates while we are about it. You were hurt on January 17th, 1952, is that correct? A. Yes.

Mr. Taylor: "Q. So on January 29th, when you got down to the President Polk, did you and your gang go right to hatch No. 1?

"A. Yes."

Do you recall that you did go to work on the President Polk on the 29th? [43]

A. I can't recall that.

Q. You can't recall that?

A. I cannot.

Q. I will direct your attention to the same deposition beginning at page 10, line 26, through page 10, line 8. Read those to yourself, please. Read those to yourself and I will ask you questions on them, Mr. Williams, starting here down through here.

The Court: Down to what line?

Mr. Taylor: It is marked, Your Honor, through 9.

Q. Have you read that? A. Yes.

(Testimony of Robert B. Williams.)

Q. Were those questions asked of you and those answers given on the day of that deposition?

A. Yes.

Q. They were? May I read them, Your Honor?
The Court: Very well.

Mr. Taylor: (Reading)

"Q. And the first day you were working, which deck were you working in the hatch?

"A. I can't remember.

"Q. Can you remember how many decks there were in that hatch? Was there one, two, three or what?

"A. I can't remember that, either.

"Q. But, in any event, you did spend all day working [44] in No. 1 hatch discharging cargo?

"A. Yes.

"Q. Did you get down to the lower hold the first day, do you remember that?

"A. No, I don't remember that."

Q. Does that refresh your memory, Mr. Williams, that you did work the Polk unloading cargo on January 29th, 1952?

A. January 29th, 1952?

Q. Yes.

A. No, I can only remember the 30th.

Q. You only remember the day of the accident?

A. Yes.

Q. You do not remember working on the Polk the day before? A. No, I do not.

Q. Would you say that you did not work there the day before?

(Testimony of Robert B. Williams.)

A. I just can't remember. I mean I do not know where I worked the day before.

Q. How long were you in the lower hold on January 30th, the day that you were injured, before you were injured?

A. How long was I at work?

Q. How long were you in the lower hold before you were injured?

A. Well, we started to at 8 o'clock that morning.

The Court: Q. What time were you injured?

A. Between 9:30 and 10:00, I think; I am not positive. [45]

Mr. Taylor: Q. That is between an hour and half and two hours after you started to work the jury was? A. Yes.

Q. You testified you spent some of that time in the 'tween deck? A. Yes.

Q. I want to know how much of the time you spent in the lower hold before you were injured?

A. I can't recollect the amount of time that was spent.

Q. Can you give me approximately how long you were in the lower hold?

A. No, I can't.

Q. Did you get from the 'tween deck level to the lower hold by means of ladders that morning?

A. Yes, I think I did.

Q. While you were at the 'tween deck level stowing this cargo, or while you were at the lower hold

(Testimony of Robert B. Williams.)

receiving the drums, did any of the ship's officers or men come down into the hold?

A. Not that I can recall.

Q. Do you recall any? A. No.

Q. Would you say some did but you do not recall it, or some did not?

A. I do not know.

Q. How many drums or loads of drums had come down into the [46] lower hold between the time that you arrived and the time that you were injured?

A. Well, I would say between 50 and 60. I don't know. There were quite a few. I can't testify any particular number.

Q. Between 50 and 60 had been loaded that morning? A. Approximately.

Q. And you had taken part in that loading, is that right? A. Yes.

Q. You and your partner? A. Yes.

Q. On the particular load that came down, the one just before you were injured, did both you and your partner go up to unhook it?

A. My partner, he made an attempt and I unhooked it myself.

Q. I understand you to say there two bridles to one hook, is that right?

A. I only unhooked one. There were two bridles.

Q. You unhooked one? A. Yes.

Q. Who unhooked the other one?

A. I don't know.

Q. Was the other one unhooked?

(Testimony of Robert B. Williams.)

A. The other one was unhooked by someone.

Q. You do not know whether it was Smith or one of the other fellows? [47]

A. Smith was working with me.

Q. You got it unhooked, I assume?

A. Yes. I unhooked the two drums we were to receive, myself.

Q. I believe you said this morning that the sling started to move and you attempted to steady it, is that right? A. Yes.

Q. How did you attempt to steady the sling after the bridle had been unhooked?

A. With one hand, sometimes two.

Q. At that time were you using one hand or two hands to steady it?

A. That particular morning?

Q. Yes.

A. I can't recall whether I used two or one.

Q. In any event——

A. I attempted to check the swing.

Q. The sling was on its way up, is that right?

A. Yes.

Q. I believe you said that you heard a noise of some kind? A. Yes.

Q. What did that sound like? What was this noise that you heard, Mr. Williams?

A. I just heard a ping and then a big roar like a bomb exploding.

Q. But before you heard the bomb exploding you heard a ping? [48]

A. They both happened (the witness snaps his

(Testimony of Robert B. Williams.)

fingers), when the hook hit the strongback I looked up and attempted to jump at the same time.

Mr. Taylor: Your Honor, I ask that that be stricken as to when the hook hit the strongback. It is not responsive to the question.

The Court: I will allow the question and answer to stand.

Mr. Taylor: Q. You say you heard a ping, is that right?

A. I mean there was a ping and a boom all at the same time.

Q. When you heard the ping, that *might* you look up, is that right?

A. When I heard the two noises at the same time.

Q. And you looked up? A. Yes.

Q. When you looked up, what did you see?

A. The beam was falling.

Q. The beam was falling? A. Yes.

Q. I believe you told Mr. Gerhardt this morning that you did not see the hook catch the beam or hook the beam. You did not see that?

A. No.

Mr. Gerhardt: I will let the record speak for itself. I do not recall the particular testimony. I do not think it is necessary to ask the reporter to repeat it back. [49]

Mr. Taylor: Q. To clarify it, it is your testimony, is it not, that you did not see the hook hook onto the beam? A. No, I did not.

Testimony of Robert B. Williams.)

Q. And did you see the hook strike the beam or did you just hear it happen?

A. I heard it happen.

Q. After you heard the ping, just immediately there was, you say, a roar?

A. It was so quick, both at the same time practically.

Q. It was a louder noise?

A. Yes, it was a louder noise.

Q. You looked up?

A. I attempted to look up. I glanced up like that. I jumped, and I was struck. That is how it happened.

Q. Did you see what it was that struck you before it struck you?

The Court: The question is, do you know what struck you?

A. Sure, after it had struck me. I mean, I couldn't—

Mr. Taylor: Q. Is that something you learned before you were struck or something you learned after you were lying there?

A. I discovered that the beam had struck me after I was—it hit me, after it struck me.

Q. You became aware it was a beam after it had struck you; is that a fair statement? [50]

A. Yes.

Q. You are sure it was not a plank that struck you? A. I am positive it was not a plank.

Q. Did any plank fall?

A. Not that I know of.

(Testimony of Robert B. Williams.)

Q. Did you tell the doctor at the St. Mary's Hospital that you were struck by a plank?

A. No, I did not.

Q. A doctor came to St. Mary's Hospital and asked you how you were hurt, did he not?

A. Yes, Dr. Yoell did.

Q. Was there an interne there before Dr. Yoell came to ask you how you were hurt?

A. Not that I know of.

Q. Mr. Williams, just where were you standing at the moment you unhooked the bridle and the sling started up?

A. I think it is on the chart there.

Q. You have indicated you were on the lower hold close to, on the chart, the side which would be the left side.

Mr. Gerhardt: The starboard side, counsel.

Mr. Taylor: On the chart it is the left side.

Q. You have indicated right here (indicating)?

A. Yes.

Q. Were you facing aft or were you facing forward, do you recall? [51]

A. The ship's bow was headed this way. We were facing that way (indicating).

Q. You have indicated through your hands that you were facing aft? A. Yes.

Q. You have indicated on the diagram here that you were closer to the starboard side than you were to the port side as you were standing there?

A. Yes.

Testimony of Robert B. Williams.)

Q. Were you able to move at all before you were struck? A. Before?

Q. Yes. I mean, were you able to take a step in any direction?

A. No, I was not. I didn't have time.

Q. And you went right down to where you were struck?

A. I wouldn't exactly say I went down. I did something like that. I made an attempt to move.

Q. Who was your gang steward on the morning of the accident?

A. A fellow by the name of Randolph.

Q. Do you remember his first name?

A. No, I do not.

Q. Was he down in the hold, in the lower hold at any time before this injury?

A. Not that I remember.

Q. Do you remember what day you left the hospital, Mr. Williams? [52]

A. The 29th of——

The Court: In any event, the record will show.

Mr. Gerhardt: The record shows May 29th.

The Witness: The 29th of May.

Mr. Taylor: Q. You were in the hospital four months? A. Practically four months.

Q. How long a time did you have the cast on?

A. Practically all of that time with the exception of ten or twelve days.

Q. I believe you testified this morning, did you not, that the cast was put on after you were in here about seven days? A. Yes.

(Testimony of Robert B. Williams.)

Q. So the cast was put on seven days after you arrived and was taken off how long before you left? Could you tell me any length of time?

A. The cast was taken off April 10th.

Q. I see you are referring to some notes.

A. These are notes I made while I was in the hospital.

Q. So the cast was taken off April 10th, and when did you have your first physiotherapy treatment? A. April 15th, 1952.

Q. And that was at the hospital?

A. Yes.

Q. Did you continue to have physiotherapy at the hospital until you left, is that right? [53]

A. Yes.

Q. When you went home from the hospital you were on crutches, I believe you said.

A. Yes.

Q. How long were you on crutches, Mr. Williams?

A. I don't know. I can't recall. I know I started using crutches.

Q. Do your notes show there what you are referring to?

A. I was given permission to use crutches on the 26th of May.

Q. That was about three days before you left the hospital, is that right? A. Yes.

Q. When did you get off the crutches?

A. That I don't know.

Q. Will you look at page 35, reading line 19

Testimony of Robert B. Williams.)

through 23, please? That is the same deposition that was taken.

Were those questions asked and those answers given at the time of the deposition, the ones that you just read?

A. I assume that they were.

Mr. Taylor: (Reading)

“Q. And you used the crutches for about a month; then you graduated to a cane?”

“A. Longer than that. For about two months.

“Q. Two months on crutches and after that, why, you graduated to the cane? [54]

“A. To the cane.”

Q. Does that refresh your recollection that you were on crutches about two months before you started using a cane?

A. No, it still does not refresh my recollection. I mean if I don't know, I don't know. That has been quite a while ago.

Q. At the time your deposition was taken could you walk without a cane? That was October 7th, 1952.

A. No, I think I had the cane.

Q. You had it with you?

A. I think I did.

Q. But at that time could you walk without it?

A. Sure, for a short distance I could.

Q. Did you have motion in your back at the time the deposition was taken? Could you move around?

A. Sure.

(Testimony of Robert B. Williams.)

Q. Could you bend over and touch your toes when the deposition was taken?

A. I don't know whether I could or not.

Q. Page 37, lines 20 through 22. Does that refresh your recollection, Mr. Williams, as to whether or not you could bend over and touch your toes at the time of the deposition?

A. I don't know.

Mr. Taylor: (Reading) Line 20:

"Q. How can you do those things? Can you touch your toes when you bend over? [55]

"A. Yes.

"Q. You can? "A. Yes."

Mr. Gerhardt: Just a moment. Your Honor, I hesitate to interrupt here, but those questions were asked in connection with the exercises the doctor was giving to Mr. Williams, and I think if he will refresh Mr. Williams' recollection by reading to him a question or two before that, it is perfectly clear from the testimony that he is not talking about Mr. Williams doing this as a matter of course; he is talking about some exercise that was given to him and what Mr. Williams was doing in reference to these exercises.

Mr. Taylor: Where do you want me to start, counsel?

Mr. Gerhardt: Line 12.

Mr. Taylor: I have no desire to hide anything here. Line 12. May we stipulate it may be read?

Mr. Gerhardt: Certainly.

Mr. Taylor: Page 37, line 12:

(Testimony of Robert B. Williams.)

“Q. How often did you come back to Dr. Yoell? Once every week, once every two weeks or what?

“A. Once or twice a month.

“Q. What does he do when you go back to his office? Just look at you, or what?

“A. Looked at me, asked me how I am feeling. He has had me sit down and cross my legs and he has had me [56] touch my toes and bend and touch my toes.”

And then the part I read earlier:

“Q. How can you do those things? Can you touch your toes when you bend over?

“A. Yes.

“Q. You can? “A. Yes.”

Q. How did your back feel, Mr. Williams, when your deposition was taken on October 7th, 1952?

A. Well, I still had the pain. I had pain in my hip.

Q. My question was about your back.

A. My back?

Q. Yes. How did your back feel when the deposition was taken?

A. My back felt fair.

Q. That was October 7th, 1952? A. Yes.

Q. When was the last time that you saw Dr. Yoell? A. You mean here lately?

Q. The last time you saw him.

A. The other day I was up at his office.

Q. When was that?

Mr. Gerhardt: That was Monday, counsel.

The Witness: Monday.

(Testimony of Robert B. Williams.)

Mr. Taylor: Q. And that was for an examination? A. Yes. [57]

Q. Did he give you any treatment or just look at you at that time?

A. He looked at me and had me go through a motion of exercises.

Q. When was the last time you saw Dr. Yoell before last Monday? A. I don't know.

Q. Approximately when was it?

A. I still don't know.

Q. Did you see him during the year 1954? That is the year just passed.

A. No, I don't think so.

Q. Did you see him during the year 1953?

A. Yes.

Q. Do you remember the dates in 1953?

A. No, I do not.

Mr. Gerhardt: We are concerned, Your Honor, about this present bill which is Plaintiff's Exhibit 15, which seems to indicate that he did have three visits to Dr. Yoell in 1953. Dr. Yoell will be here later and I presume Dr. Yoell's records will also show. I will ask him to bring the records.

Mr. Taylor: Q. Have you seen any other doctor besides Dr. Yoell for your injury since you left the hospital? A. No, I have not.

Q. Dr. Yoell is the only doctor other than the man who took the X-ray? [58]

A. I went to Permanente for some boils that I had under my arm when I was using the crutches. I saw the doctor then.

(Testimony of Robert B. Williams.)

Q. That was for boils? A. Yes.

Q. Dr. Yoell has been your doctor because of the injury that you received on the President Polk?

A. Yes.

Q. Earlier this morning you mentioned taking exercises for about a month. Were those exercises that you took while you were in the hospital or after you left the hospital, Mr. Williams?

A. In the hospital.

Q. After you left the hospital, did you take exercises? A. A few, yes.

Q. Pardon? A. A few, yes.

Q. How many? A. Well——

Q. Or how frequently?

A. Twice a week.

Q. About twice a week? A. Yes.

Q. I mean did you go some place where a physiotherapist would give you these exercises?

A. No, in my home. [59]

Q. What kind of exercises were they?

A. Well, on the flat of my back, swinging my leg, bending over, attempting to touch my toes, turning my body from side to side.

Q. That was to exercise your hip, your low back and the pelvic region, right? A. Yes.

Q. How often did you take those exercises at home? Over what period of time?

A. About a month.

Q. That would be the month of June 1952, is that correct? A. No.

Q. What month are you talking about?

(Testimony of Robert B. Williams.)

A. This is after I was discharged out of the hospital.

Q. I believe you said that you left the hospital May 29th, 1952. A. Yes.

Q. So that the month that you took the exercises would have been approximately the month of June 1952, is that correct? A. Yes.

Q. You returned to work, you believe, April 6th, 1953, is that correct? A. I believe.

Q. When you returned to work did you continue to work out of the union hall? [60]

A. Yes.

Q. Have you done any work on board a ship since the accident? A. Yes.

Q. What are you doing at the present time, what type of work? A. Car man.

Q. You are on the docks?

A. On the docks.

Q. You have done work inside the ship since the accident? A. Yes.

Q. Is the rate of pay for a man working cars on the dock the same as a man for working inside a ship? A. Yes.

Q. So you are earning the same pay, is that correct? A. Yes.

Mr. Gerhardt: I think there has been an increase in the rate, counsel.

Mr. Taylor: Q. Beginning with the third quarter—say July of 1953, which was about 18 months after your accident— A. Yes.

Testimony of Robert B. Williams.)

Q. —from that time on have you been working steadily?

Mr. Gerhardt: If Your Honor please, we have stipulated on the introduction of the Pacific Maritime Association earning records. I think those are in evidence. They speak for themselves, rather than going through attempting to have this witness reconstruct every single quarter. [61]

Mr. Taylor: I am asking whether during that particular quarter he began working steadily.

The Court: The record is here.

Mr. Taylor: It would appear to me the earnings from that time on are steady. That is why I wanted to clarify it with the witness, if I may be permitted to ask him that question.

Will you read the last question?

The Court: Reframe the question.

Mr. Taylor: Q. From July 1st, 1953 on up until the present time you have been working steadily?

A. From July to what?

Q. July 1953. That is 18 months after your injury and about three months or four months after you went back to work.

A. Have I been working steadily?

Q. Yes.

A. Not in my opinion, I have not.

Q. Have you been working every time work has been available? A. No, I have not.

Q. There are times when work would be available and you would not go to work?

A. That is true.

(Testimony of Robert B. Williams.)

Q. Your earnings have been just as high since that date as they were before the accident, have they not?

Mr. Gerhardt: Let the record speak for itself in that regard, Your Honor. The hours of labor are set forth, the [62] earnings are set forth, and there isn't any record yet on the increase in the hourly pay rates for the last few years.

Mr. Taylor: I think we are entitled to go into this question of whether or not he has worked steadily. He said he has not.

The Court: There is the record that you have stipulated might go in. It is in evidence.

Mr. Taylor: That is right.

The Court: Let it speak for itself.

Mr. Taylor: Q. Have you been doing any lifting since your return to work?

A. Yes, I have.

Q. That is heavy lifting?

Q. What do you call heavy lifting? How heavy?

Q. I will ask you how heavy a load do you lift or have you been lifting?

A. I have been lifting since I went back to work.

Q. You have been lifting heavy loads, have you not?

A. I have been lifting. I wouldn't say heavy loads.

Q. Have you loaded cement and unloaded cement? . A. Yes.

Q. Those sacks are 100 pounds, are they not?

A. I know they do.

Testimony of Robert B. Williams.)

Q. You have been doing that since the accident?

A. One or two times, yes, I have. [63]

Q. When you returned? A. Yes.

Q. You said something in your testimony this morning about taking trips. Do you mean automobile trips? A. Yes, that is what I mean.

Q. Where have you gone since the accident, that is, by way of an automobile trip?

A. From here to Los Angeles, from here to Milpitas.

Q. Have you driven to Los Angeles?

A. I usually drive part of the way. My wife drives the rest of the way. Before I got hurt I could drive all the way.

Q. How many trips have you made to Los Angeles since the accident? A. I don't know.

Q. More than three or four?

A. I don't know.

Q. Have you gone any further than Los Angeles? A. Yes, I have.

Q. How much farther? A. Texas.

Q. Have you driven back to your home in Dallas, or your former home?

A. With the help of my wife I have.

Q. How many trips back to Texas have you made since the accident? [64] A. One.

Q. When was that? A. 1953.

Q. Did you make a trip back to Texas before you went back to work, that is, during the period of time that you were off?

A. Not that I know of.

(Testimony of Robert B. Williams.)

Q. Pardon? A. I don't know.

Q. Just one trip to Texas? A. Yes.

Q. Any other trips made by automobile? No trips? A. Not that I know of.

Q. When was the first time you drove a car after the accident? A. I don't know.

Q. Approximately when was it, Mr. Williams?

A. I don't know.

Q. Before you went back to work, was it not?

A. Yes.

Q. Just one more question, Mr. Williams. Going back to the time when you were in the hold, when you heard this ping and you looked up, do you know what caused the ping? Do you know what struck what to cause the ping? A. The hook.

Q. Did you see the hook strike anything?

A. No, I did not. [65]

Q. You just heard a metallic noise, is that correct?

A. I heard the noise and I assumed that the hook struck the beam.

Mr. Taylor: We will ask that that go out as the assumption of the witness, that the hook struck the beam.

The Court: It may go out.

Mr. Taylor: Q. You just heard the noise; that is correct, isn't it?

A. Yes, I heard the noise.

Q. And you did not actually see the hook strike anything, did you? A. No.

Testimony of Robert B. Williams.)

Q. Mr. Williams, do you know why the beam fell on you, of your own knowledge?

A. I was told after——

Q. Excuse me. You can't testify what you were told. Of your own knowledge do you know why the beam fell on you? A. No, I do not.

Mr. Taylor: That is all.

Redirect Examination

Mr. Gerhardt: Q. Mr. Williams, have you ever read over this deposition that was taken on October 11th, 1952? A. No, I have not.

Q. You did not see your testimony written up in this form after you gave it on that day in October 1952? [66] A. No, I did not.

Mr. Gerhardt: If Your Honor please, opposing counsel having used this deposition to refresh the witness' recollection, I will ask that it be introduced in evidence.

The Court: What is it?

Mr. Gerhardt: Opposing counsel having used this deposition for the purpose of refreshing the witness' recollection, I will ask that it be introduced in evidence.

The Court: Let it be admitted and marked.

Mr. Taylor: Subject to all legal objections that are available. I would have no other objection than that. Is it to be marked for identification?

The Court: Yes, to be used by both sides.

(Testimony of Robert B. Williams.)

(The deposition referred to was thereupon marked Plaintiff's Exhibit No. 21 for identification.)

Mr. Gerhardt: Q. Mr. Williams, I noticed today when you came down to the board and when you took the stand and left the stand that you have a limp. Do you have that all the time? A. Yes.

Q. Have you had that ever since the accident?

Mr. Taylor: I think that is leading. I object to it on that ground.

Mr. Gerhardt: Q. Did you have it before the accident? A. No.

Q. When did you first notice that you had a limp? [67]

A. Well, when people see me walking they tell me I limp.

Q. I noticed you carried a pillow up to the stand, Mr. Williams. What was that for?

A. It is this hard chair I am sitting in here.

Q. How often do you take a pillow with you?

A. Usually take it every Sunday to church with me when I have to sit down on hard seats.

Q. Do you make any short trips in your automobile around the Bay Area?

A. Occasionally, yes.

Q. How do you feel when you drive on those trips?

A. I get pain in the lower part of my body, sometimes in the side, from sitting.

Q. And that would be on a trip of about how far in the Bay Area? A. 50 or 60 miles.

Testimony of Robert B. Williams.)

Q. Mr. Williams, some of your medical bills and your compensation was paid by your employers or their compensation carriers, is that correct?

A. Yes.

Q. Was that stopped at a certain date?

A. Yes, it was.

Q. Do you recall approximately when that was?

A. Compensation was cut off the 7th of May.

Q. Of 1952? [68] A. 1952.

Q. Mr. Williams, I refer you to Plaintiff's Exhibit 12, containing a bill from the St. Mary's Hospital, showing one amount paid by insurance and one amount paid by patient in the amount of \$143.75. Did you pay that bill? A. Yes.

Q. And I show you Plaintiff's Exhibit 15, a bill from Dr. Yoell's dated December 15th, 1952, in the amount of \$266.75. Did you pay that bill?

A. My attorneys paid the bill. They paid out of the money.

Q. That you received in the settlement?

A. Yes.

Q. I show you an X-ray bill, Plaintiff's Exhibit 13, in the amount of \$46.50. A. I paid that.

Q. Mr. Williams, do you recall what you were earning per hour in January 1952?

A. \$2.10 or \$2.12.

Q. What are you paid per hour now?

A. \$2.21, \$3.31.

Q. What do you mean by \$2.21 and——

A. Straight time and overtime.

Q. \$2.21 is straight time and \$3.31 is overtime?

(Testimony of Robert B. Williams.)

A. Overtime.

Q. Do you recall what overtime per hour was in January 1952? [69] A. \$3.15.

The Court: You can get a stipulation on that.

Mr. Gerhardt: I think we can look that out. We can look that up, Your Honor.

The Court: You may stipulate now.

Mr. Gerhardt: I do not know what it is.

The Court: You do not?

Mr. Gerhardt: No, not at that date.

The Court: Do you?

Mr. Taylor: Not at that date.

The Court: Whenever you ascertain the facts, whatever they may be, you may stipulate.

Mr. Gerhardt: Q. Mr. Williams, you testified on cross examination that you had done some ship work since the accident. Can you estimate for us the amount of ship work as compared with the amount of dock work since the accident?

A. I would say maybe a ship job every two months.

Q. About every two months? A. Yes.

Q. For how long a time? A. One day.

Q. And the rest of the time is dock work, when you do work?

A. The rest of the time is dock work.

Q. In January 1952 you were a member of what union? A. Local 10. [70]

Q. Which one? A. Local 10.

Q. Of what union? A. ILWU Local 10.

Mr. Gerhardt: Your Honor, we have one or two

(Testimony of Robert B. Williams.)

more stipulations. We have a stipulation that Mr. Williams was 31 years of age at the time of the accident and that his life expectancy was 36 years.

The Court: So stipulated?

Mr. Taylor: So stipulated, Your Honor.

Mr. Gerhardt: Your Honor, we have a stipulation that prior to the accident and the injury to Mr. Williams the safety latch on one end of No. 2 beam, No. 2 strongback, in the lower 'tween deck, was missing.

The Court: So stipulated?

Mr. Taylor: So stipulated.

Mr. Gerhardt: That stipulation, however, Your Honor, is not a stipulation that the plaintiff knew of the missing latch.

Mr. Taylor: One end or both ends?

Mr. Gerhardt: At one end. We have also a stipulation, Your Honor, that the bridle shown in Plaintiff's Exhibit 3 was gear furnished by the defendant Marine Terminals Corporation.

The Court: Let the record so show.

Mr. Taylor: Yes, Your Honor. With reference to the safety latch, whether it was missing at one end or both ends, is [71] something, of course, we do not know. Counsel has indicated it was missing at one end only.

Mr. Gerhardt: I am basing that on a report which is made of one of the longshoreman of Marine Terminals. That is why I am stipulating to it, that it was found before the accident.

(Testimony of Robert B. Williams.)

Mr. Taylor: That is something we ought to have proof on, whether it was one end or two ends.

Mr. Gerhardt: I think we will clear that up when we produce the witness who made the inspection, Your Honor.

The Court: Is that all from this witness?

Mr. Taylor: I have one or two questions on recross, Your Honor.

Recross Examination

Mr. Taylor: Q. You testified that your workmen's compensation or your longshoreman's compensation was stopped about May 7th, 1952? That is correct, is it not, or approximately that date?

A. Yes.

Q. That was because you filed a notice of election to sue, is it not, Mr. Williams?

A. Yes, that is what I was told.

Q. You have not asked Marine Terminals for any compensation since that date, have you?

A. No.

Q. Or any medical expense since that date? [72]

A. No.

Q. Did you have that pillow with you this morning?

A. I had a pillow.

Q. Did you take it up to the stand with you this morning?

A. No, I did not.

Mr. Taylor: That is all.

Mr. Gerhardt: Q. Did you have the pillow at the time you went up to the stand?

Testimony of Robert B. Williams.)

A. Not this morning. I had one back there I was sitting on.

The Court: We will take a recess.

(Recess.)

MRS. GERTRUDE MARSHALL WILLIAMS
called as a witness on behalf of the plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court?
A. Gertrude Marshall Williams.

Direct Examination

Mr. Gerhardt: Q. Mrs. Williams, where do you reside?

A. 3106 Fremont Street, Berkeley.

Q. You are the wife of Robert Williams, who was just on the stand a few moments ago?

A. I am.

Q. When were you married?

A. We were married June 19th, 1943.

Q. You were married some time then before this injury that he sustained in January 1952?

A. Yes.

Q. Mrs. Williams, what was the state of his health and physical condition prior to this injury of January 30, 1952?
A. Very good.

Q. Have you noticed, or will you please state what changes you have noticed in his condition since that time?

A. Quite a few changes. He tires very easily, and he can work on a job, but when he comes home he can't do things he used to around the home. He

(Testimony of Mrs. Gertrude Marshall Williams.)
could do the yard work and everything. Now I do that, to make it light on him so he can work and quite a few other things that he is incapable of doing, personal incapacities.

Q. Can you give us any examples of those incapacities?

A. Well, when it comes to things in the yard, he can't kneel too long. He can do anything, but he just can't do it any amount of time. Even if it comes to washing time, he can do it, you know, for awhile, and then he has to stop or he will have to lay down; whereas before he could go on as normally as anybody else.

And then he is quite nervous. He was not before. And he worries about little things that don't make any sense, you know, that you don't have to worry about. But they kind of prey on his mind, little things. Say it is raining too much. He is wondering how you are going to get the wash done, things that are of no consequence. It didn't make any difference [74] whether I washed or not.

Q. Does he complain a great deal to you about his condition?

A. No, he doesn't complain as much. It is just at night he groans. He doesn't sleep well. He turns and tosses and it is pretty hard on him. Sometimes if I ask him, he turns you kind of short. "It is none of your business." You know he is hurting.

Mr. Taylor: I ask that that part go out, "You know he is hurting."

The Court: It may go out.

Testimony of Mrs. Gertrude Marshall Williams.)

Mr. Gerhardt: Q. You may proceed.

A. And then I asked him, "Why are you like this?"

"Knee kind of hurts. If you leave me alone I will be all right."

Q. Does he ever cry? A. Who?

Q. Your husband. A. Not often.

Mr. Taylor: I am sorry, I can't hear.

The Witness: Not often. Just once in awhile. When he says he hurts pretty bad. It isn't the pain, I think. I don't think it's the pain he is crying over. It is little worries.

Mr. Taylor: We ask that the conclusion of the witness go out.

The Court: It may go out. [75]

Mr. Gerhardt: Q. What have you noticed with respect to his outlook or his mental attitude? Has there been any change in that?

A. Not too much. It is just that he worries more, and he is nervous and that kind of upsets everybody.

Q. Mrs. Williams, to what extent does he carry his pillow with him?

A. He takes it anywhere he has to sit. If we now it is going to be a hard seat, we take it. At home he can get by if he is at home. Even if he is in a soft seat, he can sit so long and then he has to get up. At home he sits on a chair and walks as he pleases, but if he is going to church or any place, any place there is a hard seat, we take that pillow. It is always in the car.

(Testimony of Mrs. Gertrude Marshall Williams.)

Q. These conditions and changes that you have testified to, do those exist today? A. Yes.

Q. Did they exist after January 30, 1952 when he had the injury? Did they begin when he came home from the hospital?

A. Yes. The reason I am slow on that, we knew he was sick when he came home from the hospital, so these things we couldn't do, such as going. I don't even go to church that much. When he went, he found out he couldn't sit. That has been going on and hasn't stopped.

Q. At all? [76] A. At all.

Mr. Gerhardt: That is all.

Cross Examination

By Mr. Taylor: Q. Just one or two questions, Mrs. Williams. Has Mr. Williams been to any doctors besides Dr. Yoell?

A. He goes to Dr. Williams. That is our personal doctor. Dr. Williams, Dr. P. A. Williams.

Q. You say he has been going to Dr. Williams?

A. He goes all the time, if he has a cold and things like that. As far as the injury, that I can't say. He knows about it, Dr. Williams knows about it. But if he has done anything on him, that I couldn't say.

Q. But he has been going to Dr. Yoell because of the injury, is that right?

A. The injury mainly is Dr. Yoell.

Q. He has been working as a longshoreman since the accident, has he not? A. Yes, he has.

Testimony of Mrs. Gertrude Marshall Williams.)

Q. Do you remember when he started after the accident? Back to work?

A. It was April or May, because he took off in June. He asked Dr. Yoell for a special certificate or something to let him do light work and see if he could do it. He said he would try, and he did. He took off in June. That much I know. [77]

Q. That is the month you went back to Texas?

A. Yes, I asked Dr. Yoell if I could take him somewhere because he wanted to go to work, so I took him.

Q. You heard him testify this morning?

A. Yes, I heard him.

Q. He has been doing the work he says he has been doing? A. I guess so. I don't know.

Q. He is working on the docks?

A. I know he works cars.

Q. And he also has worked ships?

A. I imagine so. I didn't know that.

Mr. Taylor: I have no further questions.

EDWARD B. RANDOLPH

was called as a witness and being first duly sworn, testified as follows:

The Court: What is your full name?

A. Edward B. Randolph.

Q. Where do you live?

A. I live at 2918-C Stanton Street, Berkeley.

Q. Your business or occupation?

A. Longshoreman.

Q. How long have you been so engaged?

(Testimony of Edward B. Randolph.)

A. Thirteen years.

Q. At this port all the time?

A. Yes, sir. [78]

The Court: Take the witness.

Direct Examination

By Mr. Gerhardt: Q. Mr. Randolph, what is your position today as a longshoreman?

A. I am a hold man.

Q. You are a hold man? A. Yes.

Q. Were you aboard the President Polk on January 30, 1952, as part of a gang?

A. Pardon?

Q. Were you on board the President Polk at the time Mr. Williams suffered his injury?

A. Yes, I was.

Q. Do you remember the date?

A. I know it was in the latter part of the month, but I don't remember the exact date.

Q. What was your position at that time?

A. My position at that time was hold man and gang steward to gang 116.

Q. Who sent you aboard the President Polk? Marine Terminals Corporation?

A. Yes, they did.

Q. They also gave you your pay check, did they, Marine Terminals Corporation, or did you get that elsewhere?

A. It didn't come from the Marine Terminals Corporation. It came from the whole association.

Testimony of Edward B. Randolph.)

Q. But this gang was Gang 116, which was sent aboard by Marine Terminals, is that correct?

A. That is right.

Q. On the date that you went aboard the President Polk, what were your duties as gang steward?

A. Well, my duties as gang steward is to be certain the gang works in safe conditions on the ship.

Q. What did you do to comply with the duty on this particular occasion?

A. Well, we went about the work. Do you want to start from the first day?

Q. Yes. Start from the day you went aboard. Was that the day before the accident?

A. Yes.

Q. That was the day before. Do you remember about what time you went aboard on that day?

A. Well, it was a little after eight o'clock. We started off the dock at 8:00 o'clock to board the ship. Naturally it takes a few minutes to board the ship. I would say five or six minutes after 8:00, something like that.

Q. On the day before the accident?

A. That was the day before the accident, that is right.

Q. Did you work all day that day?

A. So far as I remember, I worked nine hours.

Q. You are not certain about how long you worked? [80]

A. I am not definitely set on the time when we started. That part I am not certain about.

(Testimony of Edward B. Randolph.)

Q. On the next day, the day of the accident, what time did you go aboard?

A. The same time.

Q. Eight o'clock in the morning?

A. That is right.

Q. Where did you go to work on that morning of January 30th, the day of the accident?

A. I can't understand that.

Q. Where did you go to work? What part of the ship?

A. The day we went aboard ship, we went to Number one hatch forward.

Q. Did you remove any strong backs or hatch ports that day?

A. The day before the accident or the day of the accident?

Q. Let us start with the day before.

A. The first time we went aboard the ship, we started making up gear, rigging the boom, and getting ready to work the hatch.

Q. What did you do that first day so far as removing hatch ports and strong backs?

A. The first day I think we had opened the—I am not sure whether it was pontoons on deck or whether it was hatches. I am not positive what it was.

Q. Did you open up the deck hatch?

A. After we rigged it up, we opened up the deck hatch. [81]

Q. Completely? A. No.

Q. How far?

Testimony of Edward B. Randolph.)

A. We opened the forward end.

Q. Then where did you go? Into the shelter deck or upper 'tween deck?

A. We went into the, well, the upper 'tween deck, I think it was.

Q. We have a diagram here that I might explain to you.

The Court: Go down there and familiarize yourself with the diagram.

Mr. Gerhardt: Will you come down here, please? We have a vertical section showing the shelter deck, the first level down or upper 'tween, as you sometimes call it—is that correct? A. Yes.

Q. And then the upper 'tween deck and then the lower hold? A. Yes.

Q. Plaintiff's Exhibit Number two is a birds-eye view looking down into the hold showing the forward end of the Number two 'tween deck opening, but the next two sections having hatch ports and the beams in place.

A. That is right.

Q. The next one, Plaintiff's Exhibit 3, is a diagram showing the strong back in place and the type of bridle that was being [82] used at that time, is that right? A. Yes.

Q. Will you resume the stand, please?

Q. On the first day, Mr. Randolph, did you go down and open any part of the upper 'tween deck hatch?

A. No, the first day we started on the first deck;

(Testimony of Edward B. Randolph.)

we started on the first deck, upper 'tween deck. We started working that deck first.

Q. Did you get down below the upper 'tween deck at any time on the first day, so far as you recall?

A. Yes, I believe we did. I think we went down and started into the next deck. I am not positive. Yes, I think we did. I think we started the next deck.

Q. When you say you started the next deck, you mean the lower 'tween deck? A. Yes.

Q. What did you do on that deck?

A. On that deck I think we started to take out some cargo, I'm not positive. I believe we were discharging cargo from that deck, I am not positive. It has been so long now.

Q. When was the forward section of hatch ports removed from the lower 'tween deck?

A. Into the lower hold?

Q. So you could load or discharge into the lower hold?

A. They were removed the second day. [83]

Q. The second day. Before the accident, anyway?

A. I think we had taken off the hatches the second day. I think we had taken off the hatches the day before the accident—I don't mean the day before the accident—the second day, the day of the accident. I believe that morning we had taken the hatches off. I am not positive. I can't be positive of that.

(Testimony of Edward B. Randolph.)

Q. In any event, the first section of hatch ports on the lower 'tween deck and the first strong back was removed? A. That is right.

Q. In the forward section of the——

A. There was one strong back removed. We had taken one strong back off. That is what they call the blind.

Q. Blind strong back?

A. It is a blind to support the hatches.

Q. Is that sometimes called a queen beam?

A. No, the king beam is the beam that holds the other hatches in place.

Q. You left in the king beam?

A. The king beam was left in, that is right.

Q. That would be the Number two beam, or strong back?

A. Number 2, that is right.

Q. You left in Number 2 and all the beams and hatch ports aft of Number 2?

A. That is right. [84]

Q. Did you make any inspection of the locking devices on the strong backs? A. Yes, I did.

Q. Did you make such inspection on the morning of January 30th, the day of the accident?

A. Yes, I did.

Q. Please tell me what you did, Mr. Randolph.

A. Before I went down into the hold I checked to see if those beams were secured.

Q. What did you find?

A. I found there were no locks. One lock was completely off. The other lock was off because you

(Testimony of Edward B. Randolph.)

couldn't feel it underneath. But I am almost positive both locks were off. There was no locks on that beam at all.

Q. On which beam? A. On the king.

Q. The Number 2 strong back?

A. That is right.

Q. The one that was still remaining in place?

A. That is right.

Q. On the lower 'tween deck level?

A. That is right.

Q. Now, you remember that one was missing. You are clear about that?

A. I am positive about one being completely gone. [85]

Q. And the other one you are not sure about?

A. The other one I know was not locked on one side. The bolt was in there, but there was no pin. What I mean, there was no lock to lock the beam.

Q. Do you remember which side that was of the beam?

A. That was on the starboard side. The port side lock was completely off. The starboard side was—just at the bolt. I couldn't feel the lock but—

Q. Was there a pin or bolt through on the port side? A. Just the bolt.

Q. Just the bolt? A. So far as I know.

Q. What you are talking about is the lug or little arm?

A. That wasn't there. That was missing.

Q. That was missing? A. That was gone.

(Testimony of Edward B. Randolph.)

Q. On the port side?

A. The port side was completely off. On the starboard side was just the bolt.

Q. What did you do when you found that condition?

A. Well, I called up and told the boss, the gaffer, that the beam wouldn't lock.

Q. Who was the boss, or gaffer?

A. That is the gang boss. He is in charge of the gang.

Q. Who was that in your gang?

A. Reuben Swanson. [86]

Q. Did he reply to you?

A. I don't recall whether he did or not. I am not certain.

Q. Did you have any discussion with him about removing the beam?

A. Well, I didn't—. The only thing I said was we should remove the beam. That is all I said. I don't remember having a great discussion about it at all, as far as going up on top deck and talking with him about it.

Q. Why did you want to remove the beam?

A. Because the beam was unsafe.

Mr. Taylor: Your Honor, I think that is argumentative as to why he wanted to remove the beam. This is his witness.

Mr. Gerhardt: I want to find out why he wanted to remove the beam. That is not argumentative. That is asking him a question.

(Testimony of Edward B. Randolph.)

The Court: The objection will be overruled. You may answer.

Q. Why did you want to remove the beam?

A. The beam was unsafe.

Mr. Gerhardt: Q. Unsafe for what?

A. Unsafe for the condition of the men working underneath it.

Q. Was that beam removed?

A. No, it was not.

Q. Can you remove it?

A. I don't have any authority to remove it. All I can do is [87] tell the gaffer about it.

Q. Who has authority to remove it?

A. The walking boss.

Q. Who was that?

A. I don't know him by name, but Ernie. That is the only thing I know him by.

Q. Who?

A. Ernie. I don't know him by his full name.

Q. He was not part of your gang?

A. No, he was not. He was the walking boss.

Q. Was he from Marine Terminals?

A. Yes, he was.

Q. And he has the authority to tell you to move the beam, is that correct? A. That is right.

Mr. Taylor: To which we object as being the conclusion of the witness as to whether or not he knows.

The witness: Pardon? You'll have to make it louder.

(Testimony of Edward B. Randolph.)

Mr. Taylor: I am objecting, your Honor, it calls for the conclusion of the witness.

(Question read.)

The Witness: Ernie had authority.

Mr. Taylor: Just a minute, Mr. Witness. Until there is a ruling made——

The Court: You will have an opportunity to cross examine [88] him. I will allow it. The objection will be overruled. If he knows, he may answer.

Mr. Gerhardt: Q. Did you have any discussions either with the gaffer or the gang boss, or with your walking boss, with respect to safety conditions in that Number 1 hold? A. Yes, I did.

Q. What did you—what discussion did you have?

A. That was from the first day on. It is unsafe to work, and we were not going in unsafe conditions when we were working that ship.

Q. You had that discussion with both Ernie, the walking boss, and your gang boss?

A. That is right.

Q. Are both of those men over you, that is, superior to you? A. That is right.

Q. Was any work done with respect to moving cargo so far as safety conditions were concerned?

A. Yes.

Q. What was that?

A. We were removing drums from the coaming.

Q. What deck?

A. Just before we were down in the lower hold. That was in the lower 'tween deck.

(Testimony of Edward B. Randolph.)

Q. What was the reason you were moving that cargo?

A. That cargo was removed because it was unsafe, when we were [89] taking the hatches off going into the lower hold.

Q. Who permitted that to be done?

A. Well, Ernie permitted it to be done.

Q. How long did that take?

A. Oh, I am not positive, I think it had taken the rest of the day before. We went in the lower hold the next day.

Q. Was that done before the accident, this removal of the drums away from the side of the hatch, the lower 'tween deck?

A. No, I think it was the day before we went down into the lower hold. I think we had started to open up, if I recall—if I am not mistaken—those runs, those drums run—. I really told Ernie, myself, Ray Irvine and Smitty—the three of us had told Ernie to—well, we told the gaffer and then Ernie—that it was unsafe to work down in the lower hold, that those drums were no more than a foot from the lower hold, but they were about three tiers high.

The Court: Q. Was that the day of the accident?

A. That was the day before the accident.

Mr. Gerhardt: Q. When did you have the discussion with your gang boss and your walking boss with reference to the removal of the Number 2 strong back in the lower 'tween deck at Number 1?

(Testimony of Edward B. Randolph.)

A. That was the day of the accident.

Q. How long before the accident?

A. It was that morning, just after we had taken the hatches [90] off. I recall now. After we had removed the hatches and taken the beam out, then I inspected the strong backs to see that they were locked before we went down into the lower hold.

Q. That is when you found the Number 2 strong back was not locked?

A. That is right.

Q. And that the latch was missing?

A. That is right.

Q. Mr. Randolph, I refer you to Plaintiff's Exhibit 6, which is a photograph of a strong back with a locking device at one end. In exhibit 6, that is in the unlocked or open position, is that right?

A. Yes.

Q. In Exhibit 7 it is in a locked position?

A. That is right.

Q. Does that latch have anything to do with the way the strong back fits into the slot on the side of the hatch? The slot I am referring to is shown on Plaintiff's Exhibit 9.

A. Yes. When that beam is lowered down, then this lock is turned over and fits into it; that is, provided there is play, if there was play on the latch—if there was any play in the strong back, the strong back has to sit just right for those locks to lock. Otherwise they won't lock.

The Court: Just a minute. The reporter must get everything down. If you will talk a little more slowly and clearly [91] it will be helpful to him.

(Testimony of Edward B. Randolph.)

Mr. Gerhardt: Q. Does that lock serve the purpose of preventing the beam from being raised back up or from being lowered further into the slot?

A. That prevents the beam from coming out.

Q. Is the beam held in place with the slot itself? A. No, the slot was not in place.

Q. Assuming it was lowered in place——

A. Not if this is locked. If it is lowered into the slot, and this lock is not on, that beam wouldn't stay in place. What I mean, this lock here would hold it when it comes down into the lock.

Q. What you are referring to is Plaintiff's Exhibit 6, which shows a strong back in place with the latch open or unlocked, is that right?

A. That is right.

Q. That strong back is remaining in place across the hatch? A. That is right.

Q. It is remaining there because it is held in place by the slot? A. That is right.

Q. Is that right? A. That is right.

Q. When the latch or safety device is placed in the closed position, as it is in Exhibit 7, that prevents the strong back [92] from being raised back up out of the slot, is that correct?

Mr. Taylor: That is a leading question.

Mr. Gerhardt: I beg your pardon, your Honor; I am sorry. That is a leading question. I will ask the question directly of the witness.

The Court: It may go out. The objection is sustained.

Mr. Gerhardt: Q. When the latch is in a locked

(Testimony of Edward B. Randolph.)

position, what is the action with respect to whether the strong back can or can not be lifted back up out of the slot?

A. When the strong back is locked into position, into two slots, then it is secured. The beam can't be pulled out, unless it is busted and the locks are broke, forced open.

Q. In this particular case you found at least at one end of the strong back the latch or safety device was missing? A. That is right.

Q. Mr. Randolph, I show you Plaintiff's Exhibit 10, which is a photograph that was taken a couple of hours or a few hours after the accident occurred on January 30, 1952, and I will ask you if you can state to the Court where, in what hold, these drums that you see in the photograph with white tops are located.

A. That is in the after part of Number 1 hatch.

Q. Are you sure? Are you sure that is the after part?

A. That is the after part, because this is the row of drums and this is cargo up here.

Q. I call your attention to the fact that this is the lower [93] hold, is that right?

A. That is right.

Q. And this is the lower 'tween deck.

A. That is right.

Mr. Gerhardt: Let us mark these. With the Court's permission and Counsel's, I will mark R-1, Plaintiff's Exhibit 10 for the lower hold where the drums are located.

(Testimony of Edward B. Randolph.)

Mr. Taylor: He said the after portion of the lower hold.

Mr. Gerhardt: That is what he said, counsel. We will straighten that out in a minute, I hope. I think you will stipulate, Counsel, that is the forward end of the hold. At least, you agreed this morning it was.

Mr. Taylor: That was my understanding from what I was told.

Mr. Gerhardt: Let us clarify it through the witness.

Q. R-2 represents the 'tween deck space, lower 'tween deck space? A. That is right.

Q. Now, R-3 of the upper 'tween deck or shelter deck space? A. That is right.

Q. What portion of the hold did the accident occur? A. It happened in the after part.

Q. Are you positive of that, Mr. Randolph?

A. I'm almost positive of it, because the ship was facing—on the dock it would be facing this way (indicating). [94]

The Court: Develop whatever the fact may be on the chart.

Mr. Gerhardt: Q. Mr. Randolph, I have shown you Plaintiff's Exhibit Number 2. You have told me that Number 1 strong back was removed. With the bow at this end, that would be the forward or after part?

A. That is the forward end of the ship.

Q. The forward end of the ship?

A. That is right.

(Testimony of Edward B. Randolph.)

Q. Mr. Randolph, was there any cargo on the hatch proper in Number 1 lower 'tween deck?

A. Yes.

Q. Or was it in the wings?

A. The cargo was in the forward end. There was no cargo in the forward end of the lower hold. The cargo was in the after end.

Q. Of the lower hold? A. That is right.

Q. I am referring to Plaintiff's Exhibit 18, the Pacific Coast Marine Safety Code. Are you familiar with that code?

A. They never did issue—I never did receive a book like that. I have my own book at home, that safety code.

Q. That safety code? A. Yes.

Q. Issued to you by whom?

A. Issued to us by the longshoremen.

Q. By the union? [95]

A. Pardon?

Q. By your union? A. Yes, correct.

Q. When you stated that you made the request, Mr. Randolph, to remove this strong back, would that have involved removing the beams, too?

A. That would have involved moving that whole section out.

Q. This whole second section?

A. That is right.

Q. Referring to Plaintiff's Exhibit Number 2, about how long a period of time would that have taken? A. To remove that section?

Q. Yes.

(Testimony of Edward B. Randolph.)

A. Oh, a matter of ten or fifteen minutes to take it out.

Q. You mean both the hatch boards and the strong back?

A. And the strong backs, yes.

Q. Where were you at the time the accident occurred?

A. I had gone into the lower hold, but there were four men in the lower hold who were going to work at that time. So I was going up on deck, and just as I got up on deck, that is when the accident occurred.

Q. What did you see?

A. When I looked down in the lower hold I actually saw just a whole lot of dust and dirt, and I headed right down into the dust and dirt, because I knew somebody was hurt. I heard a [96] lot of hollering, "Somebody is hurt, somebody is hurt".

Q. What did you find when you got there?

A. When I got in the lower hold I found Williams laying across the beam.

Q. Across which beam?

A. The beam that struck, the king beam.

Q. The number 2 strong back from the lower 'tween deck? A. That is right.

Q. That was in the lower hold?

A. Yes.

Q. Williams was where?

A. He was lying across the beam.

Q. What was Williams' condition?

Testimony of Edward B. Randolph.)

A. He was pretty well—well, he was bleeding, for one thing, because we wiped the blood off.

Q. Where? A. Around his head.

Q. The forehead? A. Mouth.

Q. Mouth and forehead both?

A. Yes, because I wiped the blood off, myself.

Q. Then what happened?

A. Then I hollered up that a man was hurt and get the safety stretcher down so we could send him out. He was badly hurt. I started to talk to him, and I asked him how badly was he hurt, [97] and he said he couldn't move. So I said, "Where does it pain you?" And that is when I felt the big lump right around his back, swollen. It was as big around as a ball, in his back.

Q. A ball?

A. I would say, from what I could feel. Naturally, I didn't pull his clothes off. He was painin' too bad even to move him.

Q. How was he moved from the hold?

A. How was he moved from the hold? On a board and net. The ambulance crew—they sent a crew down. Then we put him in this net and put him on a board and sent him out.

Q. Mr. Randolph, you are appearing here today under subpoena? A. Yes.

Q. Did you receive one or two subpoenas?

A. Two.

Q. One from each party? A. Yes.

Mr. Gerhardt: That is all.

(Testimony of Edward B. Randolph.)

Cross Examination

By Mr. Taylor: Q. Mr. Randolph, you have testified that you worked the President Polk the day before the accident? A. Yes.

Q. Was Mr. Williams a member of the gang the day before the accident? A. Yes. [98]

Q. And you say that you boarded the Polk at 8:00 o'clock the day before the accident?

A. We were starting to board. At that time it wasn't exactly 8:00 o'clock. It is always a few minutes after when we start. They give us orders to work beginning at 8:00, but naturally it takes a few minutes to get aboard the ship.

Q. But it was in that vicinity, are you sure of that?

A. I couldn't say exactly what time it was.

Mr. Gerhardt: Your Honor, I have the ship's log.

Mr. Taylor: That is why I am testing his memory.

The Witness: I don't have no watch to keep the correct time.

Mr. Taylor: That is exactly why. I am testing his memory.

Q. Would you say you went aboard before 9:00 o'clock? A. Oh, yes.

Q. That was the day before the accident?

A. That is right.

Q. Before 9:00? A. Before 9:00.

Q. And you worked the ship all day the day of the 29th? That is the day before the accident.

Testimony of Edward B. Randolph.)

A. Yes.

Q. And the next morning you went aboard in the morning, that is, the day that Mr. Williams was hurt? [99]

A. Yes.

Q. I believe you testified that you made no inspection of the strong back the first day you were aboard the ship?

A. We were not at that level to inspect the strong back.

Q. So the inspection you made——

A. Was the day of the accident.

Q. The day of the accident?

A. That is right.

Q. Do you recall about when the accident happened?

A. The accident happened between 9:00 o'clock in the morning——

Q. Could you come any closer than that? Was it closer to 9:00 or closer to 10:00?

A. I couldn't say closer, because I have no watch to tell what time it was.

Q. The first place you had gone aboard the ship on the morning of the accident was to the lower 'tween deck, is that right?

A. The day before the accident?

Q. No, the day of the accident.

A. The day of the accident?

Q. Yes.

A. That is when we started to go to work in the lower hold. We started to uncover in the lower 'tween deck.

(Testimony of Edward B. Randolph.)

Q. Was that the first thing that you did, then, on the morning of the accident, was to go down into the lower hold? A. To start work. [100]

Q. Yes.

A. I am not positive, but I believe we removed the beam, the hatches. I am not certain. But I am almost sure before I went down I did inspect the king beam on that particular deck.

Q. At what time of the morning did you inspect the king beam that we have been talking about on the lower 'tween deck?

A. That was before we went to work in the lower hold.

Q. What time of the morning was it?

A. The time of the morning I couldn't exactly say because I have no watch to tell what time it was.

Q. Was it the first thing you did that morning when you went to work, or was it later on, Mr. Randolph?

A. You mean later on that I checked the beam?

Q. Yes. I'm now talking about checking the beam. I want you to tell me what time it was.

A. I don't know what time it was. I have no watch to tell exactly what time it was.

Q. With reference to the time the accident happened, how long was it before the accident that you made this inspection? Was it five minutes, ten minutes, a half hour or an hour?

A. It was before——. Now, let's see. As far as the time was concerned, I couldn't say that because

Testimony of Edward B. Randolph.)

I don't know. It was before 9:00 or 10:00, 9:00 or 10:00 o'clock, I know that.

Q. You know it was before the accident. You have said that. [101]

A. That is right.

Q. My question is, how long before the accident was it? A. I couldn't say the exact time.

Q. We are not expecting the exact time, but could you give us an approximation? Was it five minutes, ten minutes, or more?

A. I can't say that because I wouldn't want to put myself in a position to say something like this, that it was that time or five or ten minutes before that time I can't say because I don't know. It is pretty hard for me to judge time back there in 1952, and this is 1955.

Q. You were not in the lower hold at the time of the accident?

A. When the accident happened?

Q. When the accident happened.

A. No, I went down into the lower hold but I came back out.

Q. Had you done any unloading, then, in the lower hold before the accident?

A. We did not discharge, so far as I know, any cargo in the lower hold. We were loading.

Q. That is what I say. You were loading in the lower hold? A. That is right.

Q. Did you yourself have anything to do with the loading in the lower hold?

A. Yes. I started tilting up drums in the lower

(Testimony of Edward B. Randolph.)

hold. We were working half hour on, half hour off. There are four men [102] working, two men taking off for coffee or smoke. I had started myself, me and my partner.

Q. Who was your partner?

A. I don't recall his name. He is a man out in the hall. I don't know what his name was.

Q. Did Mr. Williams and his partner start at the same time you did?

A. No, not at the same time we started. They came on what they called the next half hour. That was prior to the accident.

Q. This matter of moving the drums on the lower 'tween deck, you have testified about that.

A. That is right.

Q. When did you do that?

A. That was the first day.

Q. You did that the first day?

A. Yes, we did, because it had taken us—oh, it must have taken us from two and a half to three hours, something like that. I have forgotten now.

Q. Where were those drums located?

A. They were located in the upper 'tween deck.

Q. In the upper 'tween deck?

A. I will get that straight. Let me see. The lower 'tween deck. It was in the second deck, right in the 'tween deck. That would be the lower 'tween deck, and then the lower hold.

Q. Those drums that you are complaining of, had you loaded [103] those drums? A. No.

Q. Or had they been loaded in another port?

(Testimony of Edward B. Randolph.)

A. They had been loaded in another port.

Q. Had you been discharging at the 'tween deck level on the 29th?

A. We had been discharging both decks, the upper deck and the lower deck. The first day the upper deck and then we opened during that afternoon and came down on the other deck.

Q. So we can get it straight, the lower 'tween deck is the deck where the drums were that you were complaining of; that is right, isn't it?

A. Yes.

Q. Had you discharged cargo from the lower 'tween deck on the 29th?

A. I can't recall whether we had discharged cargo off that deck or not. It is hard to say.

Q. Was there any cargo on the hatch covers on the 'tween deck on the 29th?

A. I don't recall there being any cargo on the hatch covers at all on either deck.

Q. We are just concerned about the 'tween deck.

A. So far as I can remember, no. All the cargo was in the wings, in the forward end of the ship.

Q. Did you do any work in the lower hold on the 29th? [104]

A. The first day? No, we didn't, not to my knowledge. I don't remember going in the lower hold the first day at all. I don't remember.

Q. Did you inspect more than one beam or strong back at the lower 'tween deck level on the morning of the 30th?

(Testimony of Edward B. Randolph.)

A. No, that was the only beam that had to be inspected.

Q. That was the only one you did inspect that morning, is that right?

A. That's right, the only one that had to be inspected.

Q. And I believe you testified that on the port end of the beam, if my notes are correct, there was no lock at all?

A. No, there was no lock.

Q. Is that a fair statement?

A. That is right.

Q. There wasn't even a bolt through?

A. No, there was not.

Q. That is on the port end?

A. That is on the port side, the side closest to the dock.

Q. On the starboard end of the strong back you found just a bolt? A. Just a bolt, no lock.

Q. It didn't have that little locking device?

A. No.

Q. That was on the starboard end?

A. That is on the starboard side offshore. [105]

Q. Do these strongbacks have locks, these little flanges that move on both sides, or are they just on one?

A. Just one side. They usually have one on each side, like if the ship is in port, they have one on the opposite side, one on this side and one on this side. They don't have two on the same side.

Q. To get it a little clearer, you have the strong

(Testimony of Edward B. Randolph.)

back in place. There will be a forward side and an
after side.

A. That is right. There is one aft and one forward.

Q. You are sure they are not both on the same side?

A. I know they are not. I haven't seen any on the same side yet, myself. Could be, but I have never seen them.

Q. But you are sure that the ones you looked at on the morning of the accident, there was one aft, on the aft side of the strong back and one on the forward side of the strong back?

A. They were not on there.

Q. On which end? I did not mean to mislead you. Had there been locks——

A. There had been locks, yes.

Q. One would have been aft and one would have been on the forward side?

A. That is right.

Q. I believe that you said that you told Mr. Swanson that the beam would not lock?

A. That is right. [106]

Q. Where was Swanson at the time?

A. He was on deck.

Q. On the main deck? A. Yes.

Q. When were you at the time you told him that?

A. I was over where the beam was.

Q. Were you in the lower hold, or were you on the 'tween deck? A. The lower 'tween deck.

(Testimony of Edward B. Randolph.)

Q. You were in the lower 'tween deck?

A. That is right.

Q. I believe you said he did not reply to you?

A. Not that I recall. However, he might have said something. I don't remember.

Q. You don't remember hearing him say anything? A. No, I don't remember.

Q. You said something about there being play in the strong backs? A. Yes.

Q. Do you mean an end for end play?

A. That is right.

Q. You are not talking about sideways play?

A. A little play either way. None of them fit tight. If they fit tight, we could hardly pull them out with a winch. They have play on either side, this way, and then they have a [107] play of fore and aft.

Q. Assuming that there was no lock at all at one end but there was a locking device in the other end, could a strong back be removed——

A. That is right.

Q. Even though one end was locked?

A. That is right.

Q. It takes both ends——

A. You could pull one end right out, even with the lock at one end. The strong back would still come out.

Q. It takes a locking device at both ends——

A. To hold the strong back in place.

Q. And the little lugs have to be in the notches at both ends, is that correct? A. That is right.

(Testimony of Edward B. Randolph.)

Q. As a longshoreman, have you ever put in a lock in a strong back?

A. What do you mean, have I ever put one on a strong back?

Q. Yes. A. No, never.

Q. I mean, assembled a lock on a strong back.

A. No.

Q. You have never done that? A. No.

Q. Would it be part of your duties to do that?

A. No, it would not.

Q. Just one final question. You are sure that the barrels you removed on the lower 'tween deck—you are sure that was not done the morning of the accident, before the accident?

A. No, I'm not sure whether we had done it the morning before the accident or the first day we went to work. I am not positive.

Q. It is entirely possible that it could have taken place the morning of the accident before the accident, isn't that true?

A. No, I don't think it could have, because it would take us at least an hour or two hours to remove the cargo from around the hatch. Those drums were at least a foot from the hatch, and that had to be moved out of the way. There was quite a bit of work there to be done.

Q. Well, wasn't that done the morning of the 30th?

A. I am not positive if it was done the morning of the 30th. I don't think so. I don't think it was done then. I think it was done the day before that.

(Testimony of Edward B. Randolph.)

Mr. Taylor: No further questions, your Honor.

Mr. Gerhardt: No questions.

The Court: We will recess until 10:00 o'clock tomorrow morning. [109]

Thursday, June 9, 1955, 10:00 a.m.

JAMES RANDOLPH

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, sir? A. James Randolph.

Direct Examination

By Mr. Gerhardt: Q. Mr. Randolph, where do you reside? A. Where do I reside?

Q. Yes. A. 86 Clara Street.

Q. San Francisco? A. Yes, sir.

Q. Are you any relation to the Edward Randolph who testified yesterday?

A. I am the father.

Q. What is your occupation?

A. Longshoreman.

Q. How long have you been in that business?

A. Oh, about 37 years.

Q. Do you recall being aboard the President Polk on January 30, 1952 when an accident occurred to Mr. Williams? A. Yes, sir.

Q. What was your position at that time? [110]

A. Well, I was working down in the hold with him at that time when the accident occurred.

Testimony of James Randolph.)

Q. What happened?

A. We was loading drums, and they had what they called the safety bridle bringing the drums in, four drums in on this safety bridle.

The Court: Sit down there while you are resting and relax.

The Witness: Thank you.

What happened, when the winch driver takes his bridle out, something caught the strong back and pulled it out, when we was working one section.

Q. When you say you were working one section, what do you mean?

A. Sometimes you have three sections of the hatch, sometimes four, and we was only working one section. That is, one section of the hatch was taken off, the rest was on.

Q. Mr. Randolph, referring you to Plaintiff's Exhibit 2, this middle diagram on the blackboard——

The Court: Before you examine him on a diagram, familiarize him with the diagram.

Mr. Gerhardt: I intend to examine him only on this one diagram, your Honor.

The Court: Step down. (To the witness). Are you familiar with that diagram he is talking about?

The Witness: If they are strong backs, I should
e. [111]

Mr. Gerhardt: Q. Mr. Randolph, this view looking down into Number 1 hatch and a view of the lower 'tween deck. That shows the forward section of the hatch beams removed. Is that the condition

(Testimony of James Randolph.)

that existed at the time you were down in the Number 1 lower hold?

A. The forward section?

Q. The forward section.

A. We were working on the after section. We were working Number 1 hatch.

Q. You were working Number 1 hatch?

A. That is right.

Q. Irrespective of whether it was fore or aft, how many sections of strong backs had been removed? A. One.

Q. One?

A. To my knowledge, that is, on that deck.

Q. How many strong backs were still left in place, do you know?

A. I didn't really count them. Sometimes it is three, four or five.

Q. In this particular hatch, Mr. Randolph, this diagram which has been stipulated to shows the three sections of hatch boards and five strong backs. On the basis of that, was Number 2 strong back still in place on the lower 'tween deck?

A. Yes, it had to be. Worked three sections.

Q. Will you resume the stand now, please. Now, which strong [112] back was it that fell into the lower hold?

A. Well, the strong back on the after end that the hatches were on, were resting on, on the forward end.

Q. With respect to the number of the strong back, which one was it? A. That is correct.

(Testimony of James Randolph.)

Q. Which one was it?

A. I would say it would be number 4.

Q. With respect to the end of the hatch that you were working on, how many strong backs from that end had been removed?

A. Only one.

Q. Only one?

A. We had only taken one out.

Q. That would be your next section?

A. That is right.

Q. Did you see the beam fall?

A. I did not.

Q. Did you see it strike?

A. I did not.

Q. When did you first see Mr. Williams after the accident?

A. After the strong back had fell, and I heard him hollering. It missed me by an inch, and I never even seen the strong back coming or heard anything. I was busy, you know, getting our work did. It happened that quick. I didn't see it happen. I don't know what happened. All I know, the strong back come [113] down. I heard Mr. Williams holler and his partner come, he was running. So that was that.

Q. Where was Mr. Williams in the hold at that time?

A. Well, he was working in the offshore wing.

Q. After he was injured, where was he?

A. He was laying across the strongback.

Q. Was he removed from the hold?

A. From the hold? Yes, after the doctors came down.

(Testimony of James Randolph.)

Q. Had you made any inspection of that strong back to see whether it was locked?

A. No, I did not. My son did. He was steward of the gang, and it is their duty to see that things are safe.

Q. Did you know prior to the accident that there was a latch missing from the strong back?

A. No, I didn't look myself. He taken care of it himself. He was steward of the gang and he made his report to the boss about it.

Q. He made the report to what boss?

A. The gang foreman, brother Swanson.

Q. Was the work stopped?

A. No, the work was not stopped until after the accident.

Q. After the accident, how long did the work stop for? A. What was that?

Q. How long was work stopped after the accident?

A. I would say it could be three-quarters of an hour or half [114] an hour. I couldn't estimate correctly.

Q. Are you familiar with the safety rules?

A. Well, yes, I am, quite a bit familiar with them.

Q. Are you familiar with the rule, Mr. Randolph, that provides that no cargo shall be worked through a section of the hatch unless the strong back of the adjacent section is bolted, locked or secured?

A. That is correct. That is the rules.

Testimony of James Randolph.)

Q. Are you familiar with the one that provides that the work may be stopped until that strong back is made secure or removed?

A. That is correct. That is what we are supposed to do.

Q. But that was not done? A. No.

Q. Mr. Randolph, I call your attention to Plaintiff's Exhibit 10, which is a photograph taken a few hours after the accident on January 30, 1952.

A. Yes.

Q. Your son testified yesterday that R-1 marked the lower hold where they were working.

A. That is right.

Q. R-2 marked the lower 'tween deck and R-3 marked the upper 'tween deck, is that right?

A. Yes.

Q. I notice that there is a net stretched across the hatch [115] on the level of the R-2, which is the lower 'tween deck. What is that net?

A. That is supposed to be a safety net.

Q. Were men working on the lower 'tween deck in this other section?

A. They must have been. I don't remember. I don't recall, but they must have been.

The Court: Raise your voice so they can hear you.

The Witness: I don't remember that, but I know that is supposed to be the safety net for the protection of the men working on the next deck.

Mr. Gerhardt: Q. I notice that there are no hatch boards across here, across the beam opposite

(Testimony of James Randolph.)

the mark R-2. Was that where the second section had been removed? A. What is that?

Q. The second section of hatch board. That was the section that the strong back was resting on. Had those been removed after the accident?

A. After the accident.

Q. After the accident the second section was removed?

A. They had to be removed because if they wasn't, they would fall below to damage the cargo or anything else could happen.

Q. With the arrangement shown in this photograph, was cargo worked that afternoon after the accident? A. After the accident. [116]

Q. Yes. A. Oh yes, sure.

Q. Did you participate in any work of re-setting the drums prior to the accident?

A. That is correct.

Q. When was that?

A. Well, to my knowledge they did it after the accident.

Q. I beg your pardon?

A. To my knowledge it was did after the accident.

Q. Where were the drums restowed?

A. In the lower 'tween deck.

Q. Where had they been before being restowed?

A. They was up at the lower 'tween deck. They were stowed in the wings.

Q. They were stowed in the wings?

Testimony of James Randolph.)

A. That is correct. The square of the hatch was open.

Q. For what reason were they restowed?

A. Because there was danger. There was a hatch with men working down there. If the ship took the east list, the drums are liable to fall right down on top of your head.

Q. Who issued orders for that?

A. My son told the walking boss and he told the foreman, and they got together on it.

Q. Who was the walking boss?

A. Ernie. [117]

Mr. Gerhardt: That is all.

Cross Examination

By Mr. Taylor: Q. Mr. Randolph, you say that you were down in the lower hold when Mr. Williams was injured? A. That is right.

Q. Who else was down there that morning?

A. Henry Lewis, my partner, and a fellow who was working with him by the name of Smitty.

Q. Who was your partner?

A. Henry Lewis.

Q. Your son was not down in the hold when the accident happened?

A. No, there was only four of us because it is only a small space, and that is the way we work when you get a small place like that, just four men.

Q. Had your son been down in the hold before the accident?

(Testimony of James Randolph.)

A. That is right, prior to the accident he had been down there.

Q. How long prior to the accident had your son been down in the hold?

A. I would say maybe ten minutes, maybe fifteen, something like that.

Q. How long had you been in the lower hold before the accident, Mr. Randolph?

A. Before the accident?

Q. Yes. [118]

A. Well, in general, I generally go down in the hold when I start to work and I stay down there. Lots of them go on deck, and they don't have to be down there, but generally I stay down there. When we opened up the hatch down there and started to work, I stayed down there all the time, even when the other four was working, the periods of time that they started. I still stayed down below.

Q. About how long were you in the lower hold before the accident, in minutes?

A. Well, I couldn't give no definite time.

Q. What time was the accident, Mr. Randolph?

A. I don't even know that correct.

Q. Was it in the morning or the afternoon?

A. In the morning.

Q. Was it shortly after you began work in the morning, or had you been working awhile?

A. Oh yes, I had been working awhile.

Q. You had been working awhile? A. Yes.

Q. How long had you been working in the lower hold before the accident?

Testimony of James Randolph.)

A. Well, I would say a half hour, maybe an hour, maybe an hour and a half.

Q. Which one of those figures was it?

A. Well, I couldn't say definitely. [119]

Q. You told Mr. Gerhardt that some drums had been restowed on the lower 'tween deck?

A. Yes.

Q. When was that done, before or after the accident?

A. To my knowledge, it was after.

Q. It was done after the accident?

A. To my knowledge, according to my understanding.

Q. Did you yourself inspect the strong back?

A. I did not.

Q. That is what the gang steward is supposed to do.

Q. You yourself made no inspection?

A. No, sir.

Q. When this accident happened I believe you said that you did not see the strong back fall?

A. Correct. I did not.

Q. You do not know what caused it to fall, do you?

A. No. I couldn't say, because I didn't see it.

Mr. Taylor: Your Honor, we will ask that his former testimony to the effect that something caught the strong back be stricken as being a mere conclusion of the witness and not based upon any knowledge.

(Testimony of James Randolph.)

Mr. Gerhardt: I might clarify one matter if I might ask a question at this point.

Q. Did you see a sling or bridle going up?

A. I seen it when we landed the drums, we unhooked the bridle. [120] We turned our back to the bridle to roll the drums out to where we stow them, and the winch driver takes the bridle up. The strong back came down and missed me about an inch or two inches, and my partner about the same.

Mr. Taylor: We will renew our objection.

The Court: I will allow it to stand.

Mr. Taylor: Q. Did you say that when you released the bridle you turned your back to the bridle?

A. Sure. We turned our back to the bridle and rolled the drums out to stow them.

Q. You do not know of your own knowledge whether the bridle was moved before the strong back fell, do you? Of your own knowledge?

A. The bridle was moved before the strong back fell?

The Court: Do you understand that question?

The Witness: No, you've got me kind of—

Mr. Taylor: I will reframe it.

Q. After you unhooked the bridle, do I understand that you turned your back to the bridle and started rolling the drums away?

A. That is right.

Q. And you do not know what happened to the bridle? A. I do not.

(Testimony of James Randolph.)

Q. Of your own knowledge? A. No. [121]

Q. The next thing you knew was that a strong back almost hit you?

A. That is right, and a man was in the wing hollering.

Q. Did you hear anything before the strong back, as you say, almost hit you?

A. No, it hit so quick, just like that.

Q. Your answer is you did not hear anything?

A. No.

Q. I believe that you said you saw Mr. Williams lying across the strong back?

A. Yes, part of him was across the strong back, part of him was underneath. It was on his legs.

Q. On his legs?

A. That is, his legs were underneath. I don't know whether the strong back was on top of his legs. Part of him was underneath and part was laying across the strong back when I seen him.

Q. Was he on the deck floor, that is, the lower deck floor?

A. Yes, right in the wing of the ship.

Q. Mr. Randolph, do you know whether or not any of the hatch boards fell when the strong back came down?

A. No, I don't remember any of them coming down at all. I think they was—all stayed up there, but they had three strong backs the hatch was resting on. When this was taken out they still had two strong backs there for it to rest. The [122] middle strong back held them up.

(Testimony of James Randolph.)

Q. There was only one section of the lower hold that was open, is that right?

A. That is right. We was working on what they call one section.

Q. Loads were coming down through that one section? A. That is right.

Q. Was that the fore section or the aft section of Number 1 hatch?

A. To my knowledge it was the after section.

Q. It was the after section?

A. That is right.

Q. Counting the strong back that was removed, strong back Number 1—do you understand—which number strong back was it that came down?

A. Well, if it was three section—I don't remember how many sections in the hatch—if it was three sections I would say it was Number 4.

Q. Let me ask you this: Was it the strong back next to the one that was missing, or was it one of the other strong backs?

A. Yes, it was the one next to the one that was missing. The one taken out was what we considered the blind.

Q. It was the king next to the blind?

A. That is right.

Q. Did you examine the strong back after the accident? [123]

A. No, I didn't. My son did.

Q. You did not look at the strong back after the accident? A. I did not.

Testimony of James Randolph.)

Q. As I understand, you did not look at the
rong back before the accident.

A. That is correct.

Q. Is that right?

A. That is correct.

Q. With reference to these drums that were re-
cowed, Mr. Randolph, were any of those drums on
ne hatch ports?

A. No, sir, they were all in the wing.

Q. They were all in the wings?

A. Yes, sir. As I recall, they were about three
r four high—I disremember—in the wing.

Q. Do you know who stowed those drums?

A. I don't.

Q. Had your gang stowed them?

A. They were stowed in a different port.

Q. They were that way when the ship arrived?

A. That is correct.

Q. Had you worked the ship before—the day
efore the accident?

A. Well, I may be in error there. Been so long,
I really don't have it. I looked in my book. We
tarted the ship at 1:00 o'clock, the day before.
When I looked in my book I [124] found the time
out down there.

Q. Did you work the day before?

A. That's correct.

Q. Did you work the lower hold the day be-
fore?

A. No, we discharged in the shelter deck, I

(Testimony of James Randolph.)

think. I am not positive, but we did some discharging before we went down in the lower hold.

Q. Did you discharge the lower 'tween deck the day before?

A. I disremember. I think it was the upper 'tween deck.

Q. These drums that were restowed, were they lashed with ropes?

A. They were not.

Q. Is that what you did? You lashed them?

A. No, I think we removed some of them. The ones that were in danger, we removed.

Q. And replaced them?

A. That is right.

Q. And did you lash some of them down?

A. We did.

Q. But you believe that was done after the accident? A. To my knowledge.

Q. So that the drums were in what you have called a dangerous condition on the morning prior to the accident? A. That is right.

Mr. Taylor: That is all. [125]

Mr. Gerhardt: That is all.

The Court: Q. How long did you say you were engaged in longshoring?

A. About 37 years, a little better.

Q. Where did you start?

A. San Francisco.

Q. Here at this port? A. Yes, sir.

Q. How old are you? A. 61.

ROMEO PAQUETTE

was called as a witness on behalf of the plaintiff,
and being first duly sworn, testified as follows:

The Clerk: Q. Will you please state your name
to the Court?

A. My name is Romeo Paquette.

Direct Examination

By Mr. Gerhardt: Q. Mr. Paquette, do you re-
side in San Francisco?

A. Yes, sir, 167 Rome Street.

Q. What is your present occupation?

A. Longshoreman.

Q. How long have you been doing that work?

A. 33 years.

Q. Do you recall being aboard the President
Polk on the day of the accident to Mr. Williams?

A. I do.

Q. What was your position at that time?

A. My position was winch driver.

Q. With what gang? A. 116.

Q. You were employed by whom?

A. I am employed by the Pacific Maritime As-
sociation.

Q. Your immediate employer, though, is whom?
Marine Terminals Corporation?

A. At the present time or the time of the acci-
dent?

Q. At the time of the accident?

A. At the time of the accident, Marine Termi-
nals.

Q. What were your duties as winch driver?

(Testimony of Romeo Paquette.)

A. My duties is to hoist the cargo in and hoist it out.

Q. Do you have any other duties?

A. No, that is the whole requirement.

Q. On that day, were you working with another man alternating as winch driver? A. Yes.

Q. Who was that?

A. Mr. Frank Kelberg.

Q. What was your routine in alternating or relieving each other?

A. If we started the shift at one o'clock, whoever goes on first stays one hour, and then the partner relieves one [127] hour. One hour we give the signals and one hour we hoist the cargo.

Q. Who was on first that morning?

A. I believe my partner was on first.

Q. He was on at the time of the accident?

A. I was on at the time of the accident.

Q. At the time of the accident you were at the winch controls? A. I was.

Q. Where were you located with respect to the hatch opening?

A. Up above the hatch on a kind of a platform they have built there.

Q. Mr. Paquette, I show you a recent photograph taken aboard the President Polk, Plaintiff's Exhibit 4, showing the winch driver's platform over the forward end of the hatch. Is that the place where you were located?

A. That is the place.

Q. Where were you loading or discharging?

(Testimony of Romeo Paquette.)

A. You mean the first day or the day of the accident?

Q. The day of the accident.

A. The day of the accident we were loading drums.

Q. And you were loading drums at the time of the accident into which hold?

A. Number 1 hold, the forward part.

Q. Number 1 lower hold, the forward part. How many beams had been removed from the lower 'tween deck? [128]

A. From the lower 'tween deck? Just one beam all the way down.

Q. That would mean one section of hatch boards, then?

A. One section of hatch boards.

Q. And that left numbers 2, 3, 4 and 5 beams in place?

A. Absolutely.

Q. And two sections of hatch boards in place?

A. The two sections I can't see from up above. When there is only one section off I can't see beyond that section. There may be four or five sections of hatch boards, but I can't see it.

Q. Could you see clear into the lower hold?

A. I could see clearly down to the bottom.

Q. Tell me what happened at the time of the accident.

A. Well, at the time of the accident, I took in four drums and the boys unhooked the sling, and I proceeded to come up with the hook. Sometimes these slings flop back and forth, and in the course of a day's time many times the steel heads—we will

(Testimony of Romeo Paquette.)

say, for instance, this is a strong back.

Q. You are referring to the rail in front of the jury box?

A. Yes. They flop back and forth. Nothing happens. There is a rubber around it. And this time, if the strong back had a lock on it, the little hook caught underneath the strong back.

Q. The little hook on what? [129]

A. The little hook on top of that rubber bridle.

Q. This is the bridle you were using. I call your attention, Mr. Paquette, to Plaintiff's Exhibit 3, which shows a bridle similar to the one you were using at the time, is that correct?

A. Yes, that is right.

Q. Was the bridle opposite Number 2 strong back?

A. What do you mean, opposite Number 2?

Q. Did you actually see it swing against Number 2 strong back?

A. It swings all the time. Every load it swings.

Q. Why does it swing?

A. Why? Because a lot of times the boys don't steady it. Sometimes the winches go a little faster, sometimes faster than others, and it gives a little swing, and when you are working in one section, a little swing one foot one way or the other, you don't have much space in there.

Q. Do you approve of having just one section open?

A. No, I never approve of one section. We have to stoop over to look to the botton, and it is to our

(Testimony of Romeo Paquette.)

advantage to have two, three or four sections open, if possible.

Q. Did you make a request for another section to be opened?

A. As far as making a request, I don't remember that I did, but I usually do every ship. If it isn't easy for us to load cargo, we like to have an extra section off.

Q. Who would you make that request of? [130]

A. Sometimes if the walking boss is there, he tells us when we come on the ship, "Take one or two sections off." That day whatever he said I don't remember.

Q. You follow your walking boss with respect to what sections you should remove when you first come there?

A. Not all the time.

Q. But normally?

A. Normally. If the thing is safe and everything—sometimes we can't take two sections off. They have cargo on top of the hatches.

Q. If it is unsafe, what do you do?

A. If it is unsafe, the boys underneath is the ones that are working. Those strong backs aren't going to hit me on top there.

Q. You leave it up to the boys underneath to request it?

A. Yes. If they say remove it, we remove it.

Q. Referring back to the time of the accident, Mr. Paquette, what did you actually see as you were removing the bridle from the lower hold?

A. Well, I was hoisting the bridle up. I saw it

(Testimony of Romeo Paquette.)

catch the strong back, and I stopped immediately, but those winches are quite fast, and by the time I stopped it, there is a groove where the strong back fits in. Well, the strong back was out of that groove and the hook was still holding the strong back. But due to the 'shift—in the number one hatch, the ship is [131] this way (indicating).

Q. What do you mean? Do you mean up by the head?

A. Yes, and if that ship had been on an even keel, probably that strong back would have gone right back into the slot, but it got out of the slot and had a tendency to move fore or aft, because the ship is this way (indicating), and just as soon as it moved a little bit, it fell off of the hook and down into the hold.

Q. When the ship was in the position of the President Polk on this occasion and being down by the stern and up by the head, what angle does that give to your falls as you bring it up and down out of the lower hold?

A. The further we go down the hold, the more aft the hook goes. If we go down 60 feet—of course, I am not a mathematician, but a mathematician could tell you how far down that hook isn't straight up and down.

Q. In view of that condition, what is your preference as a winch driver with respect to how many sections of hatch boards shall be removed?

A. I would like to have them all removed.

Mr. Taylor: I am going to object to the form

Testimony of Romeo Paquette.)

of the question as to what this man's preference is.

Mr. Gerhardt: Q. What is your practice, Mr. Paquette?

A. Our practice is to try to have enough room to come in and out with loads without any obstructions. [132]

Q. Does one section normally give you that on the President Polk?

A. Not at all times.

Q. Did it on this occasion?

A. I am not saying about the President Polk. I am talking about all ships.

Q. In other words, that situation can exist on all ships, is that true? A. Yes.

Q. What is your actual practice, then, generally, with reference to the removal of more than one section?

A. Generally, if nothing is said and we are able to take off two or three sections, the further we can have the boom down, the more we can see and the less obstruction for us to come up with a load without striking anything.

Q. Mr. Paquette, I refer you to Plaintiff's Exhibit Number 10, which is a photograph taken that same day but a few hours after the accident.

A. Yes.

Q. Will you examine the photograph? It has previously been marked by one witness with an R-1 and that is the lower hold where the work was being done. A. Yes.

Q. Is that where Williams was at the time?

(Testimony of Romeo Paquette.)

A. That is where Williams was. [133]

Q. And there is an R-2 at the lower 'tween deck level.

A. Yes.

Q. It appears from this photograph, and I want you to tell me whether it is right or wrong, that the second section of hatch boards has been removed. Was that done after the accident?

A. That I don't remember, whether it was done after the accident. If they had removed that—if they had removed that before the accident, that probably would have taken out that strong back.

Q. You mean the Number 2 strong back?

A. The Number 2, the one that fell down.

Q. This photograph shows the Number 2 strong back as being absent. Where was that placed? Was that hauled up to the main deck, do you remember, after the accident?

A. You mean the one that fell down in the hold?

Q. After the accident.

A. After the accident it was brought up on top and examined. They photographed both ends of it.

Q. The strong back that is still in place here after the accident, is that Number 3, this flat one here right opposite R-2?

A. It probably is Number 3.

Q. Did work continue?

A. I don't see the slots for Number 2 here. I just see one [134] slot here.

Q. This photograph has been taken from the edge of the hatch.

A. That is not the full photograph.

Testimony of Romeo Paquette.)

Q. That is right. This photograph does not show the complete forward edge of the hatch.

A. That is why you can not tell which strong back is there and which is out. If we had a complete photograph of the whole hold, we would know which one is Number 1 and Number 2.

Q. After the accident, and under the conditions shown in this photograph, did you continue to load drums into Number 1 lower hold?

A. After the man was taken care of and everything, we proceeded with the work.

Q. He was removed from the hold, Mr. Paquette? A. He was.

Q. Mr. Paquette, how long does it take to remove a section of hatch boards and supporting strong backs?

A. Depending on how many men goes after it; if the whole gang starts off, in less than ten minutes you would have it off.

Q. Are you familiar with the Pacific Coast safety rules?

A. I am not familiar with all of them because in three years' time they have put in a lot of new rules.

Q. At the time of the accident?

A. At that time we had a rule basis, to work as directed by the bosses. They are supposed to know the safety rules, and [135] the steward of the gang, and if we think it is unsafe, well, we can refuse to do it, but we can get fired for not doing it.

(Testimony of Romeo Paquette.)

Q. When you say "the bosses", who do you mean?

A. I mean a walking boss and the boss of the gang.

Q. Did you see the strong back actually fall into the lower hold?

A. I saw it, certainly. I am right there. I am the guy who's hoisting it.

Q. Where did it hit?

A. Where it came off of the bridle. One end fell down. The other end, I couldn't say where it went. It went into the sweat boards.

Q. Did it bounce after that?

A. There isn't much bounce in a strong back. Once it hits, it hits.

Q. Did you see it strike?

A. I didn't see it strike Mr. Williams. I didn't see anybody down there.

Q. Which end of the strong back did you pull out of the slot?

A. I pulled out the port side.

Mr. Gerhardt: That is all.

Cross Examination

By Mr. Taylor: Q. Mr. Paquette, did you observe the strong back after it was brought up on the deck after the accident? A. I did. [136]

Q. Did you look at both ends of the strong back?

A. No, I just looked at one end. There was no lock on it, and that was sufficient for me to look at.

(Testimony of Romeo Paquette.)

Q. When you say there was no lock on it, you mean there was no little dog—there was no bolt or no——

A. There was no bolt or no lock.

Q. That piece of metal that falls into the notch.

A. That is what they call the lock.

Q. That was missing, as well?

A. That was missing as well.

Q. I will show you Plaintiff's Exhibit 8, which has been admitted in evidence, and it has been stipulated that this is an end of the strong back taken on the opposite side of where that little piece of metal is. A. Yes.

Q. But this one shows a bolt? A. Yes.

Q. Is that the condition when the lock is in place, the little metal being on one side and the bolt going all the way through to fasten it?

A. The bolt goes through. There is a nut on one end on that little piece. Metal is on either side. They can put it either side. There is no specified side to put it on. Every ship has different kinds of locks.

Q. There are notches on both sides for the little dog to fall [137] in? A. Yes.

Q. But when you saw it, this bolt that is shown in Plaintiff's Exhibit 8 was not present?

A. It was not.

Q. There was just the hole there?

A. That is all.

Q. On the other end did you make any observation as to what the condition was?

(Testimony of Romeo Paquette.)

A. No, I didn't make no observation on the other end.

Q. Mr. Paquette, you have been a longshoreman for, I believe you said, 33 years?

A. Yes, sir.

Q. Do you know of your own knowledge that when there is a lock missing on one end it is impossible to lock the other end, even though there is a bolt, to a little dog that would go in the latch, is that correct?

A. Well, if there is one lock on one end and you have the lock on the other end, it is not impossible to lock it. You just flip it over to lock it.

Q. I think you misunderstood my question. When one lock is missing entirely——

A. Yes.

Q. ——and even though the other is in locking position——

A. Yes.

Q. ——still one end can be lifted out? [138]

A. Yes.

Q. Because there is no lock, isn't that right?

A. It can be lifted up, but if this accident—if I had had the bridle on the other end that was locked, it would never have come out. But I had the bridle on the end where the lock was not on, and it doesn't take much weight to lift up one end, when one end is secured.

Q. Before this accident happened, did you know there was no lock on that one end?

A. No, I didn't know.

Q. As I understand it, on that particular morn-

(Testimony of Romeo Paquette.)

ing, no one had told you, giving you instructions to take out the next section of boards and the Number 2 strong back?

A. No. If they did, they would have been removed, because that is our job, to do what we are told.

Q. Incidentally, what is the size of the hook that is used on this bridle that is shown in Plaintiff's diagram 3? What is the size of that hook?

A. It wouldn't be over two and a half, three inches long.

Q. What is the width of the opening?

A. I wouldn't say. Some of them have larger openings than others.

Q. Approximately.

A. Well, the wire we use is $\frac{5}{8}$ ths of an inch and there is little space for it to hook on. I wouldn't really know. I [139] never took a rule and measured the hook.

Q. But the wire that hooks into it is $\frac{5}{8}$ ths of an inch, something like that? A. Yes.

Q. That is diameter? A. Yes.

Q. Had you worked the ship the day before?

A. Yes.

Q. But you had not worked the lower hold the day before?

A. I don't recollect working the lower hold. We removed drums.

Q. You were discharging the day before, is that right? A. Discharging, yes.

(Testimony of Romeo Paquette.)

Q. From the shelter deck to the 'tween deck, is that right? A. I think so, yes.

Q. Mr. Paquette, I believe you said that the hook came in contact with the port side, the port side of the strong back.

A. That is true, yes.

Q. Could you tell at that time whether it was the port side or the port end of the strong back that did not have a lock?

A. Well, that was the port side that didn't have a lock.

Q. You know that of your own knowledge?

A. Yes. Otherwise they wouldn't have came out of there.

Q. During the morning that you were working the Number 1 hatch, were any of the ship's officers around? [140]

A. There probably was some around, but I didn't have any business with them, so I really wouldn't know. They are always around when there is a ship in port.

Q. On the day before the accident, while you were working the winch, were the ship's officers there around the Number 1 hatch?

A. I couldn't say for sure.

Q. Did you see any of the ship's officers down below during the period of time that you were working the Number 1 hatch, either the day before the accident or the day of the accident?

A. I don't recollect seeing any of them. They may have been there, but I had no dealings with

(Testimony of Romeo Paquette.)

them. So it makes no difference to me whether they are around the hatch or not if I don't see them.

Q. You didn't pay particular attention?

A. No. If I had business with them I would know.

Mr. Taylor: That is all, thank you.

Redirect Examination

By Mr. Gerhardt: Q. Mr. Paquette, Mr. Taylor has referred you to Plaintiff's Exhibit 8 showing a typical strong back. A. Yes.

Q. Is there a lip on the upper top side of that strong back?

A. There is a lip on both sides.

Q. Do you know which part of the upper or the lower side of the strong back was contacted by the bridle? [141]

A. Yes, sir, I believe it was the bottom.

Q. You believe it was the bottom?

A. Yes.

Q. Do you know what part of the bridle actually contacted the strong back?

A. It was the top edge of the hook.

Q. The top edge of the hook? A. Yes.

Mr. Gerhardt: That is all.

Mr. Taylor: Just one or two questions.

Recross Examination

By Mr. Taylor: Q. Of your own knowledge as longshoreman, is it the duty of the longshoreman

(Testimony of Romeo Paquette.)

to furnish the locks that go on the strong backs?

A. Not that I know of.

Q. Is that the ship's responsibility to furnish a strong back with a lock?

A. A strong back is the ship's equipment. It must be the ship's responsibility.

Mr. Gerhardt: We have stipulated this was missing and the ship was unseaworthy in that regard.

The Court: Proceed.

Mr. Taylor: Q. Have you as a longshoreman ever put a lock on a strong back? A. No.

Q. You have never replaced one yourself?

A. No. There are some kinds of ships with longshoremen, they [142] request a bolt. Some ships have a hole right through and they put the bolt in. When the bolt is missing, they ask the mate for the bolt and the longshoreman puts it in there. That is the only operation the longshoreman does on the lock, but he doesn't install the lock.

Q. That is on a different type of strong back, isn't it?

A. Yes, that is a different type.

Q. The strong back that was involved on the President Polk was the kind where the lock comes installed, that is, the locking device comes installed in the strong back, isn't that correct?

A. Well, it probably was put there after they built the ship. Years ago they didn't have any locks on strong backs.

Q. But this is a part of the strong back?

A. Yes.

(Thereupon the witness was excused.)

(Recess.)

FRED KELLBERG

was called as a witness on behalf of the plaintiff,
and being first duly sworn, testified as follows:

The Clerk: Q. Will you please state your name
to the Court, sir?

A. Fred Kellberg.

The Court: You talk louder than that at the
waterfront, don't you? [143]

The Witness: Yes, I do, your Honor.

The Court: It will help the reporter and the
attorneys on both sides if you will raise your voice.

Direct Examination

By Mr. Gerhardt: Q. Where do you live, Mr.
Kellberg?

A. 2427 31st Avenue, San Francisco.

Q. What is your occupation?

A. Longshoreman.

Q. How long have you been engaged in that
occupation? A. About 33 years.

The Court: Q. This port?

A. Yes, sir.

Q. All of those years? A. Yes, sir.

Mr. Gerhardt: Q. Were you aboard the Presi-
dent Polk on January 30th, 1952 when an injury
occurred to Mr. Williams? A. I was.

Q. What was your position at that time?

A. At that particular hour, I was the hatch
ender.

(Testimony of Fred Kellberg.)

Q. You were sent aboard by Marine Terminals as part of a gang? A. Yes, sir.

Q. What gang? A. 116.

Q. And did you alternate with Mr. Paquette as hatch tender and winch driver? [144]

A. Yes.

Q. At the time of the accident you were occupying the position, you stated, of hatch tender?

A. That is right.

Q. What are the duties of a hatch tender, Mr. Kellberg?

A. Well, on an American ship you stay at the railing and give the winch driver the sign to go up or down on the stuff, because he can't see the dock. That is all I have to do on an American ship.

Q. The President Polk is an American ship?

A. That is right.

Q. Are you familiar with the Pacific Coast Marine Safety Code and Rules in existence at that time? A. I think so.

Q. On the day of the accident, January 30, 1952, did you go to work as winch driver when you first aboard the ship that morning? A. Yes.

Q. Did you have any discussion with the walking boss, Mr. Bleile, regarding the removal of a strong back in the lower 'tween decks?

A. No, sir.

Q. Were you present when any discussion with him took place?

A. No, not as I can recall. I didn't hear anything.

(Testimony of Fred Kellberg.)

Q. Did you actually see the accident, Mr. Kellberg? [145] A. No, I did not.

Q. Where were you at that time?

A. At the railing.

Q. What called your attention to the accident?

A. Well, in an accident, lots of commotion, and I hear the crash, naturally, and so I looked down the hatch and I see a strong back laying down the lower hold there. The first thing I did, I run back to the railing and told the men on the deck to get the stretcher, because that is all that was necessary.

Q. Did you see Mr. Williams?

A. No, I didn't see Mr. Williams.

Q. Did you go down into the hold?

A. No, I got no business down there. They won't let me.

Q. Was Mr. Williams removed from the hold by stretcher? A. Yes.

Q. Later that day did you continue to work in the hold? A. That is right.

Q. Was any change made in the hatch boards or beams in lower Number 2 hold as far as the removal of boards?

A. The first thing, we took the strong back on deck.

Q. Did you open any more of the hatches?

A. I don't recall that we did because there was another gang working there. The way the top of those hatches are, there was no hatches removed so far as I can recall. [146]

(Testimony of Fred Kellberg.)

Q. You do not know whether there was or was not? A. No, I can't recall.

Mr. Gerhardt: That is all.

Cross Examination

By Mr. Taylor: Q. Mr. Kellberg, you say that there was another gang on one of the other decks?

A. Yes.

Q. Was that the 'tween deck?

A. The lowest 'tween deck.

Q. There was a gang working the lower 'tween deck? A. So far as I recall, there was.

Q. There had to be strong backs in place at the lower 'tween deck so that those individuals would have a place to stand, is that right?

A. That is right.

Q. I believe that you said that the strong back was hauled to the deck? A. Yes.

Q. Did you examine the strong back after it arrived at the deck?

A. Well, I recall I looked at the one end of the strong back and there wasn't a safety lock at the end I looked at.

Q. The end you looked at had no safety device at all? A. No.

Q. Is that right? [147]

A. That is right.

Q. Is that the first time you became aware of the fact that there was no safety device on that particular strong back?

A. Yes, sir, that is right.

(Testimony of Fred Kellberg.)

Q. Of course, you being at the railing, you couldn't see down into the hold at the time of the accident?

A. No, sir, I didn't see the accident.

Q. Of your own knowledge, you do not know what caused the accident?

A. No, sir.

Q. Mr. Kellberg, what is the purpose of a lock on a strong back?

A. Well, it is called a safety lock. It simply means when that lock is in place the strong back is safe.

Q. Does that mean it can not be lifted out of its slot?

A. That is right.

Q. So that the lock in position prevents the strong back from coming out?

A. Yes.

Q. As I understand your testimony, Mr. Kellberg, you do not recall whether or not after this strong back, the one that fell, was removed to the deck, you do not recall whether or not the hatch boards were taken off that section?

A. No, I can't remember that, no.

Q. Do you recall whether or not there was any cargo on top [148] of the hatch boards on the section that was right next to the section that was open? Do you understand my question?

A. Yes, I do, but I guess there couldn't be no cargo. If there had been, I guess that would fall down too. If there had been cargo. Maybe there was. When the two sections are on I can't say, I can't see from on top what really is underneath there.

(Testimony of Fred Kellberg.)

Q. To the best of your recollection, how many sections were removed, how many were off at the time of the accident? A. One section.

Q. Just one section? A. Yes.

Q. Do you recall what the situation was with regard to the section which was right next to the section that was removed before the accident?

A. Well, the strong back was off and hatch was on, naturally. There was nothing else I could see.

Q. Was that where the men were working?

A. Yes.

Q. Where the men were working before the accident? A. That is right.

Q. That is the gang on the lower 'tween deck.

A. Yes, on the after end.

Mr. Taylor: That is all.

Redirect Examination

By Mr. Gerhardt: Q. Mr. Kellberg, if Number 2 strong back is a king beam, and if that is removed, do you have to remove the next section of hatch boards? A. Well, oh, sure.

Q. Do you have to take off the next section?

A. Absolutely.

Q. Let me refer you to Plaintiff's Exhibit Number 10, which is a photograph taken a few hours after the accident on the same day, January 30, 1952, and on which the mark R-2 designates the lower 'tween deck level. A. Yes.

Q. I show you what has been testified to by one witness as a safety net stretched across the end of

(Testimony of Fred Kellberg.)

one section of hatch boards, and I show you there is the foot of a man at the top there. A. Yes.

Q. What is the purpose of that safety net?

A. Well, just for the man that is working right there, so they don't go down to the lower hold.

Q. Work continued, did it not, on the after section of the hatch in the lower 'tween deck?

A. So far as I can recall, it did, yes.

Q. You were asked on the cross examination, Mr. Kellberg, and you testified that when the safety latch was in place, it meant to you that the beam was safe. What does it mean to you [150] when the safety latch is not in place or not locked?

A. It means it is unsafe.

Mr. Gerhardt: That is all.

The Court: Is that all from this witness?

Mr. Taylor: No, one more question about this net, if the Court please.

Recross Examination

By Mr. Taylor: Q. Showing you Plaintiff's Exhibit 10, being a photograph, you have pointed out a net which is at the lower 'tween deck level.

A. Yes.

Q. Do you know of your own knowledge when that net was put in place, that is, in the location where it is on the lower 'tween deck level?

A. No, I do not, because that is always put up by the other men, you see. I wasn't working with them. They had to be safe there. Our gang was working down here.

(Testimony of Fred Kellberg.)

Q. This is another question. Do you know whether or not at the time of the accident there was a safety net at a location more forward than the location as shown there?

A. I wouldn't know that.

Q. You wouldn't know one way or the other?

A. No, sir.

Q. But it is the practice of longshoremen to work on one side of the net? [151] A. Yes.

Q. In this particular picture, this man is shown with his foot on one of the hatch board sections. Do you know if that section he is working is to the aft of the ship or the fore part of the ship?

A. It is to the aft of the ship. Here is where we was working.

Q. You are indicating where the numbers are in the lower hold?

A. That must be the bow end of the ship.

Q. I am asking you.

A. Yes, that is the way the picture looks to me.

Q. This particular hatch has three sections, is that right? A. Yes.

Mr. Taylor: No further questions.

Mr. Gerhardt: Q. Mr. Kellberg, when men are working on hatch boards, and a section of a hatch is open to a deck below, is it the practice to put up a safety net across the end of the hatch boards?

A. Yes, it is at all times.

Mr. Gerhardt: That is all. [152]

REUBEN SWANSON

was called as a witness on behalf of the Plaintiff,
and being first duly sworn, testified as follows:

The Clerk: Q. Please state your name to the
Court, sir. A. Reuben Swanson.

Direct Examination

By Mr. Gerhardt: Q. Where do you live, Mr.
Swanson? A. 2527 28th Avenue.

Q. What is your occupation?

A. Longshoreman.

Q. How long have you been engaged in that
work? A. Oh, about 35 years.

Q. Are you still doing that work, Mr. Swanson?

A. No.

Q. Are you retired now? A. I am retired.

Q. On January 30th, 1952, were you aboard the
President Polk at the time an accident occurred to
Mr. Williams?

A. I was not. I was on the dock at the time the
accident occurred.

Q. Were you a part of the gang number 116
aboard the ship at that time?

A. I didn't get——

Q. Were you a part of the gang number 116?

A. 16, you mean.

Q. Yes. A. Yes, sir. [153]

Q. Were you a part of that gang?

A. Yes.

Q. Were you employed by Marine Terminals?

A. Yes.

(Testimony of Reuben Swanson.)

Q. On the morning of the accident, Mr. Swanson, what position did you occupy with the gang?

A. As a gang boss.

Q. As the gang boss? A. Yes.

Q. Who was your immediate superior?

A. Ernie Bleile, I think it is.

Q. The walking boss?

A. Walking boss, yes.

Q. At the time of the accident you were actually there, did you say, on the dock?

A. I was on the dock at the time it happened.

Q. That morning prior to the accident did you know there was a safety latch missing on Number 2 strong back on the lower Number 1 'tween deck?

A. Yes, my steward told me that the lock was missing.

Q. That is, the gang steward?

A. The gang steward.

Q. Was that Mr. Edward Randolph?

A. Edward Randolph.

Q. He told you what? [154]

A. He told me that there was a lock missing on a strong back down below.

Q. In the lower 'tween deck?

A. In the lower 'tween deck.

Q. What did you do about that?

A. Well, I couldn't do nothing about it because I couldn't take it on myself to tell the boys to take the section off.

Q. Isn't that part of your duties?

A. My duty would be, I guess, to go to the walk-

(Testimony of Reuben Swanson.)

ing boss first and tell him about it and for him to decide.

Q. Did you go to the walking boss?

A. I did not.

Q. You did not go to him? A. No.

Q. Why not?

Mr. Taylor: Just a minute. I think that is argumentative. It is his own witness.

The Court: The objection will be overruled. You may answer.

Mr. Gerhardt: Q. Why didn't you go to your walking boss about this condition?

A. Why I didn't go?

Q. Yes.

A. Well, I don't know. I know it was unsafe to work there.

Q. You did know that? [155]

A. The boys, they was told to go down the lower hold that morning. They went down, and they didn't say nothing until a few minutes afterwards.

Q. Who told them to go down there?

A. Well, I told them to go down to the lower hold and start to work.

Q. What do you mean, they didn't say anything until a few minutes afterwards? Did they say something to you? A. Afterwards, yes.

Q. You do not mean after the accident?

A. No, no, before the accident.

Q. Did you discuss that with Mr. Bleile, the walking boss?

(Testimony of Reuben Swanson.)

A. I did not because the boys had told him already, as the steward had told me.

Mr. Taylor: Just a minute. I will ask that that go out as being hearsay.

The Court: The objection is sustained.

Mr. Taylor: I ask that it be stricken.

The Court: It may go out. Develop the facts, whatever they may be.

Mr. Gerhardt: If your Honor please, I think that is pertinent as to the reason why he did not report it, even though it is hearsay. I do not offer it for proof that two of the other men told him. I offer it for the purpose of showing the reason he has given as to why he had not reported [156] it to the walking boss.

The Court: The Court has ruled. You may develop the facts, whatever they may be.

Mr. Gerhardt: Q. Did you make any examination of this Number 2 strong back yourself, Mr. Swanson?

A. I wasn't down in the morning when we turned to at eight o'clock. I didn't go down into the hold. They were all in the square of the hatch. The boys knew what to do, so I told them to go down there and start to load drums. So there was no discussion to be made, just to tell them to go down there.

Q. To lower drums into the lower hold?

A. Yes.

Q. How long after that was it called to your at-

Testimony of Reuben Swanson.)

ention as gang boss that this latch was missing on Number 2 strong back?

A. Well, that was just a few minutes after that they went down that Randolph told me there was a lock missing.

Q. Did you make any report to have the strong back removed? A. I did not.

Q. And why not?

A. Because there was a gang working in the after end, and that gang had refused to work on one section. So they wanted the two sections to work, so we had only one section to work.

Q. So you left the beam in place in order to permit the other gang to work on the after section, is that right? A. Yes, sir. [157]

Q. Even though you knew it was unsafe at the time for the men below? A. Yes.

Mr. Taylor: That is argumentative, your Honor.

The Court: He may answer. What is the answer? Did you answer that yes?

The Witness: Your Honor, I don't understand it right now.

The Court: Develop the facts.

Mr. Gerhardt: Q. At the time you permitted the Number 2 strong back to remain in place——

A. Yes.

Q. Was it in an unsafe or safe condition?

A. It was unsafe.

Q. What are your duties as gang boss, Mr. Swanson?

A. Well, to get orders where to work, where to

(Testimony of Reuben Swanson.)

go in the morning or whenever you start, and he tells me what to do or where to place the cargo, and I tell them where to place it.

Q. What are your duties as to safety?

A. My duties for safety?

Q. Of the men.

A. To look that everything is safe for the men.

Q. Are you familiar with the Marine Safety Code that was in effect at that time?

A. Well, I guess I am. [158]

Q. And with the various rules about stopping work if there is any unsafe condition?

A. Yes.

Mr. Gerhardt: That is all.

Cross Examination

By Mr. Taylor: Q. Mr. Swanson, what time did you go aboard the Polk on the day of the accident?

A. Eight o'clock.

Q. Approximately when was the accident itself?

A. Well, I should say about 9:30 or a little better. Around 25 minutes of ten.

Q. Had you been down in the lower hold at all that morning? A. Not that morning, no.

Q. Had you been down in the lower hold the morning before? A. No.

Q. Was there any restowage of cargo on the lower 'tween deck on the day of the accident?

A. No, no restowing of cargo.

Q. Do you know anything about a complaint having been made that there were drums at the

(Testimony of Reuben Swanson.)

lower 'tween deck level which were too close to the coaming? A. Yes.

Q. Do you recall that incident? A. Yes.

Q. When did that take place? [159]

A. Well, they talked about it the first day, but there was nothing done about it. They talked about it. The gang steward said those drums are unsafe.

Q. You mean a complaint was made the first day? A. Yes.

Q. The drums at the lower 'tween deck level were unsafe? A. That is what they said.

Q. Were those drums restowed?

A. No, we never restowed them.

Q. They were never restowed?

A. No, we took them out.

Q. When were they taken out?

A. They were taken out the second day.

Q. Were they taken out before the accident?

A. Yes.

Q. The morning before the accident?

A. Yes.

Q. And they were later put back?

A. No, I didn't put them back.

Q. So far as taking them out is concerned, how long did it take to remove these drums about which the complaint has been made?

A. How long did it take to take them out?

Q. Yes.

A. It took about an hour with the hatches and all. [160]

(Testimony of Reuben Swanson.)

Q. Was that the first thing which was done on the morning Mr. Williams was hurt?

A. I don't recall now if we had taken up any drums at all that morning. I don't recall that. But the boys—they made a complaint about the drums, and at the time the walking boss was alongside the hatch, and then, of course, I think the gang steward talked to him about—. Of course, all of them was talking to him as far as that goes, telling him that was unsafe. So Ernie said, "Take them out."

Q. They were talking about the drums that were along the coaming on the lower 'tween deck?

A. Yes.

Q. And that is the only complaint they made, so far as you know, at that time? A. Yes.

Q. So you took about an hour to take them out. Do you remember about what time it was when you had completely finished that job? The job of taking out these drums?

A. Taking off the hatches?

Q. Yes.

A. Well, it was about an hour.

Q. What time did you finish?

A. Well, say it was about 9:30.

Q. And then it was after that that Mr. Williams went out into the lower hold, is that right? [161]

A. Well, the four of them went down there after we had taken the hatches off. The four of them went down and started work.

Q. Do you know who those four were, the

Testimony of Reuben Swanson.)

first four that went down into the lower hold on the morning of the accident?

A. No, I don't remember that, but I guess you know that we worked a half hour on and a half hour off when it is in the square of the hatch, because there isn't room enough for eight men. So I think Lewis and I don't—Irvin, a fellow by the name of Irvin—he is now deceased—and the other two I don't remember.

Q. They were the first four to go down?

A. I think they were the first ones to go down that first half hour.

Q. Was Mr. Williams in the first group that went down in the first half hour?

A. I don't think so.

Q. Was Mr. Randolph in the first four that went down?

A. No, he wasn't. He was in the second four.

Q. He was in the second four? A. Yes.

Q. And it is your recollection Mr. Williams was in the second four?

A. In the second half hour.

Q. Yes, the second group of four to go down?

A. Yes. [162]

Q. How long after Mr. Williams went down was it that Mr. Williams was hurt?

A. Well, now, you see, I wasn't on the deck when this here happened, but, as I said, it happened around, well, somewhere around twenty-five to ten or something like that. That is the time I would set.

Q. You have told me, you have testified here

(Testimony of Reuben Swanson.)

that the steward told you that one of the locks was missing. A. Yes.

Q. Who was that man? Who was the steward?

A. Eddie Randolph.

Q. Eddie Randolph? A. Yes.

Q. When did he tell you that?

A. Well, it was just a little after they had gone down into the hold that morning.

Q. How long before the accident was it?

A. Well, this here was about a quarter past eight, just after they had started to work.

Q. That he told you this? A. Yes.

Q. Did he tell you this before you stowed these barrels on the lower 'tween deck?

A. The hatches was open. That section of the hatches was open when we came there that morning. So when the boys went [163] down, I heard them talk about the safety lock missing, and that was Randolph, Eddie Randolph told that.

Q. Was that before or after the barrels——

A. That was before the barrels were taken out.

Q. It was some time before the barrels were taken out? A. Yes.

Q. Now, this gang that you have mentioned that was working the after end, they were on the lower 'tween deck, is that right? A. Yes, sir.

Q. How much of the lower 'tween deck were they using in their work? Were they using the two sections that were left?

A. Well, they were landing on the after section.

Q. Yes.

(Testimony of Reuben Swanson.)

A. That was where they was working, you might say. They were landing a load on the after section, but the middle section, there was all kinds of lumber and things like that laying on that section in the after part of the middle section.

Q. The after part of the middle section had——

A. The boys, you know, when they are working, taking cargo out and so on, if they have any loose dunnage and so on, they generally have some slings there ready, and they throw the dunnage on the slings ready to take it out.

Q. Was there a safety net there?

A. That I couldn't recall. I don't remember if there was or [164] not.

Q. That is, before the accident you do not recall whether there was a safety net there or not?

A. You see, all that stuff laying on the hatches and so on, many times they don't bother putting up the safety net. There is all kinds of lumber laying there, but it is supposed to be there, of course.

Q. After the accident, was a safety net rigged up?

A. That I don't remember, either.

Q. You do not recall?

A. No.

Q. We have a picture here, Plaintiff's Exhibit Number 10, which shows a safety net on the lower 'tween deck, does it not?

A. Yes, it shows.

Q. Do you know when that safety net was put in that position?

A. I don't recall it, I don't recall it, because

(Testimony of Reuben Swanson.)

after we got the strong back up on deck and so on and took all the pictures, and everybody was around there, I didn't watch down in the hold and so on and so forth.

Q. You don't know when this picture was taken?

A. No, I don't.

Q. Did you examine the strong back that fell, after it fell?

A. On deck, yes. I watched it on deck when I came up.

Q. What was the condition?

A. Well, there was no lock on the port side, just the hole, [165] that is all.

Q. Not even a bolt through, is that right?

A. No bolt or nothing.

Q. What was the condition of the other end?

A. I really don't recall that, neither, I really don't.

Q. You just took at look at one end and saw there was no locking device at all?

A. If I'm not mistaken, I think there was a lock there.

Q. You mean on the other end?

A. On the other end, yes.

Q. You told us in your testimony this morning that a strong back without a lock was unsafe?

A. Yes.

Q. Why is it unsafe?

A. Well, because if you hit it with a load or a sling going up, and you have some speed to it, it

(Testimony of Reuben Swanson.)

don't take much to take that strong back off at one end.

Q. If there is no lock, there is nothing to hold the strong back in the cleat or slot, is that right?

A. Yes.

Q. And without a lock, it can be moved out of the slot, is that right?

A. It could be easily done, yes.

Q. Just one more question. Mr. Swanson, on the morning of the accident, before the accident, did you see any ship's [166] officers around the Number 1 hatch?

A. I don't recall that at all. I don't even know any of the officers on board there. I don't remember seeing anyone on board.

Q. Do you remember seeing any ship's officers or men below the decks on the day of the accident?

A. No, I did not.

Q. How about the day before?

A. I was there then, but I didn't see none of the officers. Maybe I seen them, but I didn't know them.

Mr. Taylor: That is all.

Mr. Gerhardt: That is all.

(Witness excused.)

CHARLES M. HAID, JR.

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Q. Please state your name to the Court.

A. Charles M. Haid, Jr.

(Testimony of Charles M. Haid, Jr.)

Direct Examination

By Mr. Gerhardt: Q. Mr. Haid, what is your address?

A. At the present time 1650 Russ Building, San Francisco.

Q. What is your profession?

A. I am an attorney.

Q. You are licensed to practice in the State of California?

A. Since 1941 and at the present time.

Q. During 1952, with what firm were you working? [167]

A. I was a member of the firm of Treadwell and Laughlin, having offices in the Mills Tower.

Q. Did you handle a case that had been filed in the State Court named Robert Williams versus the American President Lines, Ltd.? A. I did.

Q. Was a settlement of that case made, Mr. Haid? A. There was.

Q. I will show you Plaintiff's Exhibit Number 19 and ask you what that is.

A. This is the release that I prepared in connection with the settlement of the Williams case against American President Lines and presented it to his attorneys at the time, and secured Mr. Williams' signature and that of Mr. MacMurray, one of Mr. Williams' attorneys.

Q. Did you obtain this in exchange for certain funds?

A. Yes, I procured from American President Lines a check in the amount of \$62,500.

(Testimony of Charles M. Haid, Jr.)

Q. I will show you Plaintiff's Exhibit 20.

A. This is the check that I exchanged with Mr. Williams and his attorneys for the release.

Q. Mr. Haid, preparatory to obtaining the release and settlement, did you conduct any negotiations with the attorneys for Mr. Williams?

A. Very extensive negotiations. [168]

Q. Will you please tell us the nature of those negotiations and the extent of the same and the factors—first of all, please state the extent and nature of the negotiations.

A. Commencing perhaps late in November, 1952 or early in December, 1952, the case against American President Lines being at issue, having a trial date in the Superior Court, as in the usual instance, the attorneys for the plaintiff and the defendant do have discussions, and we did in this case concerning the matter of the trial or settlement. Those negotiations and conferences between Mr. MacMurray and Mr. Andersen on behalf of Mr. Williams and myself on behalf of American President Lines went on, I would say, for about two months anyway, discussing the facts of the case from both sides, the nature of the injuries received, the problems of legal liability, and the demand made by Mr. Williams' attorneys in respect to settlement.

Q. What were those demands?

A. The initial demand in respect to a settlement that I received was in the amount of \$90,000. We negotiated at great length, Mr. MacMurray, Mr.

(Testimony of Charles M. Haid, Jr.)

Andersen and myself, and I was able to secure successive reductions in that demand down to a stated absolute flat minimum of \$75,000 or trial.

Q. Did you have any further negotiations after that?

A. Yes, I did. I would say late in December and early in January, we continued our negotiations after I received that [169] stated flat minimum of \$75,000, and I was eventually able to secure further reductions in the demand, although I had been told time and again that the stated flat minimum was not going to be—anything below that was not going to be recommended to Mr. Williams by Mr. MacMurray or Mr. Andersen. Notwithstanding that fact, I was able to secure further reductions, and eventually we arrived at the settlement that was achieved of \$62,500.

Q. What factors, insofar as the injuries to Mr. Williams were concerned, were taken into consideration by you in that settlement figure?

Mr. Taylor: Your Honor, I do not know that that is pertinent insofar as this witness is concerned. This man is not a medical man. That is, I assume he does not have a medical degree along with his law degree. But it would seem to me any information he had about injuries would be hearsay compiled upon hearsay, and it would not be proper for him to express an opinion as to the medical picture of this man. I think the doctors can do that.

Mr. Gerhardt: Q. Let me ask you this, Mr.

(Testimony of Charles M. Haid, Jr.)

Haid: Did you receive a report of the medical findings? A. I did.

Q. And of the treatment that had been given to Mr. Williams? A. I did.

Q. And that was a report of whom? [170]

A. Dr. Rodney Yoell, who was the doctor who treated Mr. Williams on behalf of the compensation carrier for Marine Terminals, and who also was chief surgeon for American President Lines, oddly enough.

Q. What factors other than the medical data, which we shall obtain through a doctor later on, did you take into consideration in entering into this settlement at \$62,500?

A. Well, I was, of course, greatly concerned with the medical situation in that it pointed out to my mind a rather substantial wage loss during the time that Mr. Williams was incapacitated, and was going to continue for a number of months, perhaps six or more after the time when we first began settlement negotiations.

Q. Let me interrupt you just a moment, Mr. Haid. Approximately how many months did you consider he would be out of work?

A. Eighteen months.

Q. And you computed that at about how much per month? A. About \$400 per month.

Q. Proceed, please.

A. In addition to the actual wage lost, as I said, during the period of Mr. Williams' incapacity, there was the further problem of estimated wage

(Testimony of Charles M. Haid, Jr.)

loss in the future because of the nature and extent of his disabilities. Then in addition thereto, I was concerned with the rather substantial compensation payments that had been made. [171]

Q. Do you recall about how much that compensation lien was?

A. To my best recollection, it was around, very close to \$2,000, give or take \$100. In addition, there were the medical bills and expenses which had been run up over the period of time that Mr. Williams had been treated.

Q. Approximately what did those special damages total?

A. My best recollection of it at this time is that it was very close to \$10,000, somewhere between \$9,000 and \$10,000. Oh, just the medical bills?

Q. No, the entire—

A. The entire special damages, to my recollection, is between \$9,000 and \$10,000, just through the period of time that Mr. Williams was going to be incapacitated, and that, of course, took no account of his future wage loss, general incapacity and things of that nature.

Q. During that period of time, did you ever have an opportunity to personally observe Mr. Williams? A. Yes, I did.

Q. Under what circumstances?

A. I took his deposition in my office. I believe it was sometime during the fall of 1952, and I had a very good opportunity to observe him at that time.

Q. What was his appearance at that time?

(Testimony of Charles M. Haid, Jr.)

A. Mr. Williams appeared to me at that time to be in pain over the injuries that he had received. When he came into the [172] office, he was using either one or two canes at the time—probably one—and he had to use a pillow on the chair on which he was sitting, and at various times during the course of the deposition, which didn't take more than perhaps, oh, maybe an hour or hour and a half; but he had to get up and move around. We had to stop the deposition from time to time so that he could exercise himself in various ways to relieve the pain which he stated was present in his back and in his hip.

He also appeared to be in a very nervous condition and somewhat irritable, too.

In general, he appeared to me to have received a very serious injury at the time he stated he did, and he was still suffering pretty much from the effects of it.

Q. You took his testimony at the time, did you?

A. Yes, I did.

Q. By deposition? A. Yes.

Q. Was the deposition used in your determination of an ultimate settlement of this matter?

A. Oh, yes, it was.

Q. And that was the deposition that was taken October 7, 1952? A. Yes.

Q. Did you have an opportunity to observe Mrs. Williams at any time during this period? [173]

A. I did. Mrs. Williams accompanied Mr. Williams to the taking of the deposition, and was pres-

(Testimony of Charles M. Haid, Jr.)

ent at the time. I agreed to her presence in the room while the deposition was being taken because of the representations of Mr. MacMurray, who said that it would probably be a good thing if Mrs. Williams were there to help keep Mr. Williams calmed down.

Q. Was she present all during the deposition?

A. She was.

Q. Did you have an opportunity to observe her during the absence at any time of Mr. Williams?

Mr. Taylor: Your Honor, I am going to object to any observations of Mrs. Williams as being incompetent, irrelevant and immaterial as to Mr. Williams, if your Honor please, which is the subject matter of this interrogation.

The Court: Objection sustained.

Mr. Gerhardt: Q. Did you have any discussion with Mrs. Williams with respect to the physical condition or result of the injuries to Mr. Williams?

A. I did.

Q. Mr. Haid, up to January, 1953, approximately how many personal injury cases, if you can estimate it, had you defended?

A. Well, that is pretty hard to answer, Mr. Gerhardt. I will try to do my best on it, though. When I first started to break in, in 1941, I was there with Treadwell and Laughlin for about a year until I went into the Army, and I was actively [174] engaged most of my time in the personal injury field. After I came out of the Army in 1946, from then on up to the time of, say, January, 1953—that is

Testimony of Charles M. Haid, Jr.)

seven years—I had the sole responsibility in the office for the handling of all personal injury claims against American President Lines. It is hard to say, but I would say that during those seven years, oh, there must have been hundreds.

The Court: We won't be able to get through with this witness, so we will take an adjournment until 2:00.

(Adjournment taken until 2:00 p.m.) [175]

Direct Examination—(Continued)

By Mr. Gerhardt: Q. Mr. Haid, in the handling of the defense of these injury cases, do you give any consideration to awards at the time for judgments in other cases?

A. Oh, very much so, Mr. Gerhardt. That is one of the most important things that the defense or the plaintiff's attorneys is concerned with, how the juries and the judges alone have been dealing with damage cases, personal injuries. As a matter of fact, there has been a constant increase in jury awards and awards by a Court sitting alone.

Q. Did you take into consideration any such factors during the negotiations for settlement of the Williams case?

A. Yes, Mr. Gerhardt, I did. As a matter of fact, there were several cases just about that time that were called to my attention very forcibly in the newspapers and through my own knowledge, very high awards and settlements.

Q. In addition to the facts that you testified to,

(Testimony of Charles M. Haid, Jr.)

Mr. Haid, do you recall any additional factors which influenced you in arriving at a settlement?

A. Yes. One of the primary matters that any defense is concerned with, is, of course, the question of legal liability to the injured person who has filed the suit, based on the investigation that was made and the legal research that I undertook. [176] Taking everything into consideration, I felt that there was a case of absolute liability on the part of American President Lines to Mr. Williams.

Q. On what legal basis?

A. On a seaworthy basis.

Mr. Taylor: Just a minute, before that is answered. I am going to object and ask that the answer be stricken pending the objection.

The Court: It may go out.

Mr. Taylor: Whether or not there was a question of absolute liability on the American President Lines I think is one of the points that your Honor is going to be called upon to decide and to determine, and I do not think it is proper, and we object to this witness making a statement along those lines because of the fact that it is one of the ultimate issues for the court to determine. The second point is, I believe it is a self-serving statement.

Mr. Gerhardt: If your Honor please, it may well be that that question is one for your Honor to decide, and I am calling for this testimony not for that purpose, but opposing counsel has disputed that this was a reasonable settlement, and in ascertaining whether this was a reasonable settlement,

Testimony of Charles M. Haid, Jr.)

I think we should determine what counsel had in mind when the settlement was made and the basis for it, both legal and factual.

The Court: For that limited purpose, I will allow it subject [177] to a motion to strike.

Mr. Gerhardt: Q. Were there any additional factors?

A. Yes, there were. I was concerned in large part with Mr. Williams himself, in that, in light of the very severe injuries that he had received, I was concerned about the fact that he was a young man. He was only 31 at the time he was so badly hurt. He had a long life expectancy before him, and based upon the injuries, it appeared quite clear that he would always be a disabled man, and that he would have a certain limitation of motion in various parts of his body and would be subjected to pain and suffering at various times from time to time throughout the remainder of his life.

Because of this disability, he would also be lacking the opportunity to take jobs on the waterfront as a stevedore that otherwise would have been open to him, in that his disabilities and injuries confine him to certain jobs only rather than the full sweep of jobs that otherwise he would have been able to partake.

Q. In arriving at an ultimate conclusion, did you confer at all with anyone else in the office?

A. Yes, I did. As a member of the firm of Creadwell and Laughlin, I conferred from time to time not only on the facts as we developed them

(Testimony of Charles M. Haid, Jr.)

and as were developed by means of deposition and otherwise and the legal problems involved, the value of the case by way of jury trial or settlement—that was all [178] discussed quite thoroughly from time to time with both Mr. Treadwell and Mr. Laughlin.

Q. Were there any other factors that influenced you, Mr. Haid, or have you outlined most of them that you can think of now.

A. Well, other than those that I believe we discussed this morning, I think that pretty well covers it, Mr. Gerhardt.

Q. Based on those factors that you testified to, Mr. Haid, you ultimately decided to settle the case at what figure? A. \$62,500.

Q. Based upon these factors that you testified to and your past experience, will you please state whether in your opinion as a lawyer that amount was reasonable or unreasonable.

Mr. Taylor: Before you answer it, I am going to interject the same objection, your Honor, inasmuch as that is one of the points that your Honor will be called upon to determine, and also it is a self-serving statement. This man was a party to this matter and he is attempting to make a self-serving statement in his own behalf.

The Court: You have raised the issue which is here in the pleadings, according to counsel.

Mr. Gerhardt: That is right, your Honor. This man who was the one actively handling the defense of this case—I know of no one better able to evalu-

Testimony of Charles M. Haid, Jr.)

te a case on a certain basis and on whether he thought that was reasonable or unreasonable. [179]

Mr. Taylor: But, your Honor, it is a self-serving statement.

The Court: There are exceptions to the rule of a self-serving statement. Since you have raised the issue in the pleadings, I am going to allow the testimony for the limited purpose for which it has been offered. The objection is overruled.

A. I considered that statement to be eminently reasonable on the part of the defense.

Mr. Gerhardt: Q. Following the conclusion of the settlement, the transfer of funds and the execution of the release, was dismissal of the action filed? A. It was.

Q. What was the date upon which settlement was concluded? A. January 16, 1953.

Q. Do I recall correctly that you testified the case had been set for trial at that time?

A. It had been set for trial on four separate occasions in the Superior Court. The first time, I believe, was in October of 1952. I secured a continuance from Mr. Williams' attorneys on three separate occasions, to November, to December, and the absolute last continuance was to January 16, 1953.

Q. Following the conclusion of the case, did you render a bill to American President Lines for legal services?

A. Yes, the office of Treadwell and Laughlin did render a bill. [180]

(Testimony of Charles M. Haid, Jr.)

Q. Do you recall the amount of the bill?

A. \$5,000.

Mr. Gerhardt: Counsel, will you stipulate that that amount is reasonable, or do you wish to go into the factors?

Mr. Taylor: I want you to go into the factors. I will not stipulate that that is a reasonable amount.

Mr. Gerhardt: You have seen this bill?

Mr. Taylor: Yes.

Mr. Gerhard: Q. I hand you, Mr. Haid, a document dated January 10, 1955 and ask you what that is.

A. This is the office copy, Treadwell and Laughlin, office copy of the bill that was rendered to American President Lines for services rendered in Williams against American President Lines.

Q. Was there a companion case to Williams against the American President Lines?

A. Yes, there was: Carl Smith against American President Lines. He was a stevedore who was down in the hole with Williams and who, I believe—my recollection is not too good as to Smith, but I believe he was hurt at the time, too.

Q. Had that case been concluded at the time Treadwell and Laughlin was dissolved at the first of this year?

A. Not to my knowledge.

Q. Is that the bill you rendered to American President Lines? A. Yes, it is. [181]

Mr. Gerhardt: I will ask that this be introduced in evidence.

(Testimony of Charles M. Haid, Jr.)

The Court: Let it be admitted and marked next in order.

Mr. Taylor: We are objecting to the exhibit, your Honor, as to the amount only, and we would like the right to cross examine on that.

The Court: You will have full opportunity.

(The bill referred to was thereupon received in evidence and marked Plaintiff's Exhibit 22.)

Mr. Gerhardt: Q. Was that bill paid, Mr. Haid?

A. Yes, it was.

Q. You have already testified this morning to some of the factors that you considered in making the adjustment in this case at \$62,500, which included some of the work you did on the defense, but will you please state what other work you did as a basis for your charge in the amount of \$5,000 for the defense in this case.

A. Pardon me. Can we go off the record? Dr. Yoell is here.

Mr. Gerhardt: We have told Dr. Yoell we would put him on as soon as he came in.

The Court: Very well. Is there any objection?

Mr. Taylor: No objection, your Honor.

RODNEY YOELL

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court,

sir. A. Rodney A. Yoell.

(Testimony of Rodney Yoell.)

Direct Examination

Mr. Gerhardt: Q. Dr. Yoell, what is your profession? A. Surgeon.

Q. Licensed? A. Yes, sir.

Q. What medical schools?

A. St. Louis University School of Medicine.

Q. Internship?

A. St. John's Hospital in St. Louis, for three years; post-graduate work and resident surgeon, St. Francis Hospital, San Francisco, one year; and Europe for nine months.

Q. Medical societies?

A. The American Board of Surgery, fellow of the American College of Surgeons.

Q. Are you connected with any hospitals, Doctor?

A. Yes, I am on the staff of the Polyclinic Hospital.

Q. Do you have any specialties? I beg your pardon for interrupting. Proceed.

A. St. Mary's Hospital.

Q. Do you have any specialties?

A. Surgery.

Q. How long have you been practicing medicine?

A. Graduated in 1917 and started to practice in 1921. [183]

Q. Doctor, this trial involves as one of the issues an injury to a man named Williams, who was admitted to St. Mary's Hospital, according to the record that has been introduced in evidence, on

(Testimony of Rodney Yoell.)

January 30th, 1952. Were you the attending physician for Mr. Williams? A. Yes.

Q. Let me hand this record to you, Doctor. It is Exhibit No. 12. Doctor, when did you first have occasion to see Mr. Williams?

A. I saw him on the day that he was hurt. That was—I can refer to my own record.

Q. Very well, Doctor. Do you have your own record with you? A. Yes.

Q. It was subpoenaed, is that correct?

A. I have been subpoenaed, yes. I saw him on the 30th of January 1952.

Q. At whose request?

A. The Marine Terminal.

Q. Where did you see Mr. Williams?

A. At St. Mary's Hospital.

Q. Did you make an examination of him at the time? A. Yes, I did.

Q. What examination did you make and what did you find, Doctor? [184]

A. I had the history that he had been injured by having been struck by a hatch beam, which is a heavy metal beam, and that he was taken to the hospital. When I saw him he was in shock, evidently, and very severely injured. His legs were paralyzed, his motion was limited. It was my opinion at the time that he had an injury to the spinal cord, either a direct injury to the cord, compression or hemorrhage, and the X-rays, the emergency X-rays showed that he had a fracture of the right side of the pelvis which ran clear through into the

(Testimony of Rodney Yoell.)

right hip joint, and the rim of the right hip joint was torn off and partly displaced. There was a separation of those fragments.

He had a fracture of the sacrum——

Q. Excuse me, Doctor. Are you reading from a report? A. Yes.

Mr. Taylor: Your Honor, may I ask a few questions on voir dire with regard to the X-rays?

The Court: Yes.

Mr. Taylor: Q. Doctor, did you take these X-rays yourself? A. No, sir.

Q. Are you a roentgenologist?

A. No, sir.

Q. You are relying upon the reports that you have to interpret the X-rays? [185]

A. No, I look at them myself, too, and match the findings with the report, with the physical findings and the symptoms. Each one is a link in the chain.

Q. Then you did see the X-rays?

A. Oh, yes.

Q. And you read the X-rays yourself?

A. Well, I looked at them in conjunction with the X-ray man. That is a specialty, too, and I am a surgeon, and we take—they are able to give us a better interpretation than we are.

Q. I appreciate that. Is the report that you are giving of the X-rays, is that your report, or somebody else's, Doctor?

A. No, the report that I am giving is my diag-

Testimony of Rodney Yoell.)

osis. It is not the X-ray man's report, but it is just based partly on the X-ray man's report.

Mr. Taylor: Thank you, Your Honor.

The Court: You may proceed.

Mr. Gerhart: You may proceed, Doctor.

A. He had a fracture of the lower portion of the sacrum—that is the wedge bone, the tailbone of the pelvis. That was separated. And then on the other side of the pelvis, on the left side, he had a fracture of what is known as the lower ramus, the inferior ramus. That is the lower segment or branch of the left pelvic bone, which is the bone that you sit on, and that had considerable displacement.

Then he had fractures of the first, second, third and [186] fourth transverse processes of the lumbar vertebrae on the right side. There was concussion and hemorrhage into the spinal canal with anesthesia and discoordination of the feet and toes. That is, he could not execute passive movements, and he couldn't tell whether his toes were up or down, which toe you were touching, or whether he was being touched with the head of a pin or the fine point of the pin.

He also had evidence of a rupture of the kidney or a hemorrhage around the kidney and internal abdominal injury, probably a partial rupture of the liver with hemorrhage into the abdominal cavity.

Q. What treatment did you give him, Doctor?

A. We treated him for shock, got him out of his shock, and then we put him in traction, that is, we put appliances on his legs to stretch the muscles

(Testimony of Rodney Yoell.)

after he was completely out of his shock. We gave him medication for his pain. I believe we gave him a blood transfusion or two, and then after he was out of shock and able to move, we put him into a full body cast, a pelvic cast, and waited.

Q. How long?

A. Well, he was under my care—the last time I saw him, except when he was in the office the other day, was about a year after he was hurt.

Q. Do you know the date of that last examination, Doctor?

A. It is here in the record. I believe it was January 1953. [187] It was February 17th, 1953.

Q. Doctor, how long was he in the body cast?

A. He was in the body cast—I would have to check that with a hospital record—but I would say the better part of nine or ten weeks, about ten weeks.

Q. After the body cast was removed, what was his condition?

A. Well, he was sore, stiff, and had limited motion, and he was on crutches. The injury to the cord had disappeared. He had coordination, he had sensation, but he was still in a condition to need medical care. Getting him out of the cast—when he was out of the cast he was by no means through with his treatments.

Q. Doctor, when was the next examination that you made, or did you continue to make examinations of him in the hospital quite frequently?

A. Yes, I saw him in the hospital twice a day

(Testimony of Rodney Yoell.)

and once a day for a considerable period of time. I saw him on the 30th of January, and I visited him twice again that day, and I saw him the following day three times, and I saw him again for a complete physical examination, neurological examination. Of course, I saw him daily again on 2/1/52 and 2/2/52 I saw him twice a day. On the 6th of February I put him in the full body cast, and then I visited him daily from February 3rd to February 29th. And then from March 1st to March 31st daily.

And then I saw him on the 4th and 5th and right through to the [188] 30th of March, when I did another complete examination. I saw him from April 1st to April 30th, daily, and from May 1st to May 19th, daily.

Q. Did you make a special examination of Mr. Williams during December of 1952?

A. I believe I did.

Q. Can you state what examination you made, what his complaints were and what you found?

A. If Your Honor will excuse me, I grabbed these out of my file. I haven't got them in sequence. Yes, I am examined him in December 1952—the 15th of December or the 14th of December. At that time he had considerably improved. He was off crutches. He was complaining that he had a limp. X-rays were taken and showed that all his fractures except one had healed. He complained of low back pain and limitation of motion, severe pain in the right hip and pain in the right buttocks. He had a limitation of flexion of the hip of

(Testimony of Rodney Yoell.)

about 15 degrees and a limitation of abduction, that is, pulling the limb away from the main line of the body. He gave no evidence of any further sensory disturbance.

Q. By "sensory" what do you mean?

A. I mean he didn't have any zones of either hyperexcitability or less susceptibility. In other words, he had no areas of numbness, no area of soreness, and he was able to tell which toe was up and which was down, which toe we were [189] touching and which areas of skin were being touched.

Q. Proceed, Doctor.

A. Forward flexion, that is, bending forward and touching the floor, was quite painful but he could make it. Flexion of the hip was limited and painful. He had definite limp with limitation of motion in the right hip, limitation of forward flexion of the spine, and his abdominal symptoms had cleared up. So in December he still had a damaged hip and still had a damaged back.

Q. What were your conclusions at that time, Doctor?

A. I thought that the man would ultimately make a recovery so that he could get around without crutches and work, but I didn't want to give a final opinion at that time without the test of effort, because these cases are treacherous. A man may be able, particularly a laborer might be able to move around his house and do light work or something of that sort but he couldn't go out and

(Testimony of Rodney Yoell.)

take a pick and shovel job and do heavy lifting or an occupation requiring agility. And so I thought the limitation that he had in flexion of his spine and the limitation of pain in the hip would be a more or less permanent thing, and I was still a little bit skeptical about what would happen to the cord injury because of the chance of scar tissue formation there, which sometimes occurs.

Q. Doctor, how long do fractures of that type remain painful even after they are healed? [190]

A. Fractures can remain painful for a very long period of time, several years.

Q. Doctor, this limitation of motion in the hip that you mentioned, that was related to what fracture?

A. He broke his pelvis into so many pieces it would be hard to tell just which one fracture would be responsible for his limitation of motion. But the main thing which limited motion was he broke the socket into which the head of the thigh bone rests—in other words, the ball and socket joint. The rim was torn free and shoved down into the joint, and the actual socket into which the head of the bone rested was also smashed, and there had been hemorrhage into that undoubtedly with formation of some adhesions and a narrowing and unevenness of the joint surfaces.

Q. Doctor, what are the possibilities of arthritis in view of the fractures of the hip bone and the pelvis, rather, in that manner?

(Testimony of Rodney Yoell.)

A. Well, where you break into a joint where a fracture line runs into a joint——

Q. Did it run into the joint in this case?

A. Yes, it did. It busted right into it in several places. Where a fracture goes into a joint, the joint is lined with a membrane which is cartilage. That should be smooth, glistening, and allow free motion. When a fracture occurs and the bone heals by callous, there is a roughness caused, and the more [191] roughness of motion, the more the irritation, another drive to throw out a protection, and you can an increase of callous, and any fractures involving the joints—there is not always a condition known as traumatic arthritis, but you may have it and you may not.

Q. Did you make a recent examination of Mr. Williams at our request?

A. Whose request?

Q. At our request.

A. Who is "our"?

Q. Mr. Poole. A. Yes.

Q. What was the date of that examination?

A. That was about a week ago, 6/6.

Q. Will you state, Doctor, what complaints he made, what examination you made, and what you found at that time?

A. He complained of low back pain after he had been working for a while, especially if he had to do any climbing up and down ladders or stairs. He complained also of difficulty in sleeping in any

(Testimony of Rodney Yoell.)

one position for any great period of time, that he would get a pain in his back which would wake him up and he would have to shift his position. He said his back got tired, that is, he would do a certain amount of work, he would be all right for two or three hours, but he would gradually get weaker and he couldn't do the lifting that he ordinarily [192] had been accustomed to do.

Incidentally, this fellow was remarkable because he has an almost perfect body. He is a magnificent specimen, so much so that it was noticeable, and he still had a limitation of motion in his back and a slight limitation of motion in his hip, and it is understandable—I believe the man when he gives the subjective complaints.

He also has a distortion of the framework of the pelvis, which would put certain muscles under strain and after use cause pain, where if the fracture had not occurred he would not have that trouble.

Q. You are talking now about a distortion due to the fracture of the pelvis?

A. Yes, the lower part of the left pelvic bone had overriding fragments, and that changed the angle of the two hips where the thigh bones fit in, and it would be like a loose segment of a hinge. You go to shut a door, and there is a jump to it as you swing the door over, and that is permanent.

Q. Based upon your own examination, and from a medical, reasonable certainty, that is permanent, Doctor?

(Testimony of Rodney Yoell.)

A. Yes, that is permanent. That is a fixed deformity.

Q. Have you anything to add to your prognosis or to the examination that you made just recently, Doctor?

A. The only thing I could add is I think the man's injuries substantiate his claim to pain after considerable use. He is [193] working but he does not—he told me he does not go down into a hold. He stays out of very heavy lifting. He takes sling jobs or drives a jitney. He said he can't go down into the hold because he can't get out of the way quickly enough if anything drops. He has a certain slowness about him and he shows it.

When you strip him, ask him to take his clothes off, he is a little bit slow about it and he doesn't know he is being watched.

Q. You determined that from your examination?

A. Yes. You go out of the room and look through a special hole and see what he is doing. If a man tells you he can't bend over, you knock his hat off the hook and he stoops down to pick it up. You then know he is a fake.

Q. Did you have any suspicion of that in this case, Doctor, when he was putting on his trousers?

A. He steadied himself a little bit. He seemed to me to be telling the truth.

Cross Examination

Mr. Taylor: Q. Doctor, you have been testifying from your own office notes? A. Yes, sir.

(Testimony of Rodney Yoell.)

Q. You have need of those to refresh your recollection of that? A. Yes, sir. [194]

Q. You have had many patients other than Mr. Robert Williams, have you not?

A. Yes, sir.

Q. May I see them? Is this your complete office file, Dr. Yoell?

A. As far as I know, yes.

Mr. Taylor: I wonder if it would not be in the interests of saving time to take a short recess while counsel and I go through these.

The Court: Very well. We will take a short recess.

(Recess.)

Mr. Taylor: Q. Dr. Yoell, you saw Mr. Williams at the request of the Marine Terminals, did you not? A. Yes.

Q. And you continued to treat him at their request, did you not? A. Yes.

Q. The longshoremen's insurance carrier, the Firemen's Fund, paid you for services rendered, did they not?

A. Up to a certain time, yes.

Q. There was a time beyond which Mr. Williams paid you himself?

A. I didn't charge him. When they terminated, I continued to treat him but I never charged him for it.

Q. So you never charged Mr. Williams in addition to what the [195] Firemen's Fund paid you?

A. I got a notice from the Firemen's Fund. It

(Testimony of Rodney Yoell.)

was a little obscure to me. But there was a lawsuit coming along. He was not going to get any more compensation. They would not be responsible for the bills. So the man was not fit to be turned loose without medical observation. I told him to come on, I would take care of him, which I did.

Q. You received a letter which drew your attention to a suit? A. Yes.

Q. You have a copy. I think it is on top here. Is this the document to which you refer, Doctor?

A. Yes.

Mr. Taylor: We will offer this in evidence.

Mr. Gerhardt: No objection.

The Court: Let it be admitted and marked next in order.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Taylor: Q. I believe this is dated May 26, 1952, is it not? A. Yes.

Q. At that time Mr. Williams was still in the hospital, wasn't he?

A. I believe he was out of the hospital. I will have to look at the date of the discharge from the hospital. [196]

Q. I think it has been established that he left the hospital on May 29th, 1952.

A. Yes. That would be afterwards, yes.

Q. That was some two or three days after you got the letter?

A. He left on crutches.

(Testimony of Rodney Yoell.)

Q. Do you have a portion of your file that shows the history he gave you of how he received his accident, Doctor?

A. I have down here a note of the history that he gave me. Of course, that is on the first sheet of the industrial report. Working in the hold of a ship, a hatch beam fell or dropped, and struck him after a fall from one deck to another. But he was too sick to do much quizzing when he had been in there. He was a very sick boy.

Q. I notice a history in the hospital record, Plaintiff's Exhibit 12, which states, "Patient admitted after accident at work. Patient states he was hit in lumbar sacral area by a large plank, and this knocked him forward and he went limp, falling to his knees." Is that the history he gave you?

A. That is the entrance history.

Q. I see. But you did see him when he was admitted to the hospital?

A. Yes, it was an emergency call and I went right out there.

Q. And he was conscious, was he, when you talked to him?

A. Yes, he was conscious.

Q. And I believe you said he was in shock? [197]

A. Yes.

Q. In my notes here you said his legs were paralyzed.

A. Yes, his lower legs were paralyzed—not his thighs, but his legs.

(Testimony of Rodney Yoell.)

Q. And he moved his legs, or is that just a numbness?

A. No, he couldn't move his toes. He couldn't move his ankles.

Q. But could he move his legs from his hips?

A. Yes, he could move his hips, he could move his legs above his knees, but not below.

Q. How about his knees. Could he move his knees?

A. Partially. It was partial flexion, but he couldn't move at the ankle. He couldn't bend his toes. He couldn't extend his toes.

Q. It was the toes and ankle that were involved?

A. The toes and ankle were involved, and necessarily some of the muscles here (indicating). This is the leg.

Q. Did you give him a neurological examination?

A. Yes, several times.

Q. I mean on the day that he went in?

A. Oh, yes.

Q. Is this a result of the neurological examination on the day that he went in, could you tell me?

A. That is the entrance examination.

Q. Could you tell me what the interne found from the [198] hospital record there insofar as the sensory and lower extremities were concerned?

A. If I can read this writing, his modalities appear to be intact.

Q. What does that mean?

The Court: This is the interne?

A. Yes.

(Testimony of Rodney Yoell.)

Mr. Taylor: Q. This says "motor".

A. Yes, that there is sensory.

Q. What does it say about the motor?

A. No muscle power loss ascertained.

Q. What does that mean?

A. That he didn't find any loss of muscle power, any disability of movement.

Q. Would that include the lower extremities?

A. I don't know. He doesn't say.

Q. Did he have certain tests, neurological tests?

A. Yes.

Q. What are the results of those?

A. He had some disturbance——

Mr. Gerhardt: If Your Honor please, is counsel asking the doctor the results of an examination that the doctor made or that someone else made?

Mr. Taylor: It is an interne. That is my understanding, that those are interne's notes? [199]

Mr. Gerhardt: I suggest if you want the interne, Mr. Taylor, that he be called rather than ask Dr. Yoell how he interprets the interne's writing and conclusions.

Mr. Taylor: Q. Doctor, opposite Babinsky there are some symbols. Can you interpret those?

A. I will leave it to you. Is that negative or plus? I can't read that. He had a hieroglyphic here, but here he has positive pathological reflex. Here is pathological reflex. Here is pathological reflex. He has the conventional signs for those.

In explanation, Your Honor, some of these boys from different schools have different symbols for

(Testimony of Rodney Yoell.)

different things and they carry them into interne years. It is a sort of a bastard shorthand.

Q. I am asking you if you can tell what that means.

A. No. He has a Babinsky. I can't tell whether it is positive or negative. A minus sign would be negative. Here he has positive, positive, positive.

Q. Can you interpret those?

A. Yes, I interpret those as disturbance to his reflexes and injury to his cord.

Q. That was on the first day that he was in?

A. Yes.

Q. Does it show there was any inability to move his lower extremities at the time the interne examined him? [200]

A. It said he can readily move lower extremities, but marked limitation is present, and he concludes a lumbo-sacral pain.

Q. In other words, he can move them but it hurts to move them?

A. It says they are moved but limited.

Q. Limited due to pain?

A. He says limited due to pain.

Q. Now, X-rays were taken at the hospital, were they not? A. Yes, sir.

Q. And I believe you said that seven days after his admission a body cast was put on?

A. About that time. The chart would show when he went up there. His first X-rays were taken in bed. He was too sick to move out of his bed. And then we had further studies made when he was out

(Testimony of Rodney Yoell.)

of his shock. Then the cast was applied about a little over a week later. The cast was applied on 2/6/52.

Q. That would be about seven or eight days after he arrived? A. About that.

Q. And he wore that cast until what date? Does the record show?

A. He wore that cast until——

Q. I think if you will look at pages 19 and 20 you will find out—maybe page 19 was on the application of the cast.

A. February 6th he was taken up to the cast room.

Q. I think it was April 10th. Do you want to look on that [201] date and see if that does not——

A. The 17th, body cast removed.

Q. So the cast was removed April 10th?

A. Yes.

Q. Doctor, you stated that in your original findings, if I recall your testimony, there was some involvement of the kidney. A. Yes.

Q. Just what was that involvement?

A. Well, he had some blood in his urine and he had exquisite pain and tenderness and swelling around there, and muscle spasm, and I thought he had a rupture or partial rupture or tearing of the kidney and hemorrhage around the kidney.

Q. How long did he have blood in the urine?

A. It wasn't more than a couple of days. I saw him void and there was gross blood in the urine at the time. Then we had it checked in the laboratory,

(Testimony of Rodney Yoell.)

because if it continued you have to go in there and sew the kidney up. He was catheterized that night and a specimen sent to the laboratory. A test taken the following morning showed negative blood. So that bleeding had stopped.

Q. So the laboratory specimen that was sent to the laboratory did not reveal any blood in the urine, is that correct?

A. No. That is right.

Q. That test was taken, I think you said——

A. The urine was drawn at night. They had him catheterized. [202]

Q. The test was run the next day?

A. Probably the next morning.

Q. Other than that was there any subsequent evidence of blood in the urine? A. No.

Q. So that the kidney condition cleared up within a matter of two or three days, is that correct?

A. The actual bleeding, blood in the urine, certainly, it cleared up; but the hemorrhage around the kidney did not. That was a very painful thing.

Q. The black and blue area remained?

A. Yes, the swelling, the tenderness, the high white count and fever.

Q. But that cleared up in due course, did it not, Doctor? A. Yes, sir.

Q. So there was no residual evidence of injury to the kidney? A. No.

Q. You said there was some involvement of the liver. Did that also clear up in the course of time?

A. Yes.

(Testimony of Rodney Yoell.)

Q. So there is no permanent injury to the liver in any way? A. No, not in my opinion.

Q. Pardon?

A. I say I do not think there is, not in my opinion. I do [203] not find any evidence of it.

Q. You say he was put in traction?

A. Yes.

Q. That is prior to the application of the body cast?

A. That is right, and we upended the bed, put some sandbags around him, skeletal pull.

Q. Do the notes show how much of a pull was put in? A. No.

Q. Do the notes show any traction?

A. No, I don't see any here. But I know that he had traction because I put him in traction myself and made sure he was in the proper position. The position of the bed changed. His position in bed changed as well as his position in the bed. Sandbags were placed and pillows placed so there would be a stretch of the muscles.

Q. But there is no record of it, is that correct?

A. I do not see any here. It would probably be in there. In explanation of that, this man was sick at the time, and you do what you have to do. Sometimes we do not put down each exact thing that is done at that particular moment.

Q. You take care of the patient and let the nurses take care of the record?

A. You take care of the record yourself as much

(Testimony of Rodney Yoell.)

as you can, but at that time you know what you do for the man.

Q. You are sure in your own mind that you had him in [204] traction?

A. I didn't put him in Buck's extension. I put him in traction. In other words, I didn't hang any apparatus or splints on him. But you flex his knees. We have a tractor bed, lower on one side, and the weight of his own body stretches and pulls it back.

Q. Did you put him in hyperextension?

A. No, I didn't put him in hyperextension on account of the fractured vertebra, but I did bend his knees, hang his knees over in this position, you see, so there would be some pull when his body slid back, to try to take the pressure off the fractured hip joint, and he got a little straightening by the weight of his own body, would be sufficient.

Q. You mentioned fractures of the vertebra.

A. Yes, sir.

Q. What part of the vertebra was fractured?

A. The part called the transverse processes. Those are the lateral prominences, lateral flanges that stick out.

Q. They are the little bony protuberances?

A. That is right.

Q. How many were broken?

A. Four or five, I think.

Q. Did they heal without difficulty?

A. Yes, they did. There is one, I think, that did not unite, but the majority of them healed. At least

(Testimony of Rodney Yoell.)

there was no [205] residual disability as far as that was concerned.

Q. Insofar as the transverse processes are concerned, there is no permanent disability there?

A. No.

Q. Any pain in the area of the four transverse processes? A. Yes.

Q. Presently? A. Yes.

Q. What part of the body is involved?

A. The muscles—Doan's kidney pills have their ad, the hand is placed over the back like this. That is where the pain is, in the soft part of the back, between the last rib and the upper part of the hip bone.

Q. You say he complained of pain in that zone the last time you saw him? A. Yes.

Q. Do you have any note of that? A. Yes.

Q. Where have you noted the pain in that area?

A. "Tires in back easily."

Q. Tires in back easily?

A. Yes. This is my own shorthand.

Q. So you interpret the fact that he told you he tired in the back easily that he has pain in the back?

A. He had pain and soreness and some evidence of slight [206] muscle spasm there, yes, definitely. You see, those big muscles that attach the trunk to the pelvis come off as four fractured transverse processes, and a blow or injury that is sufficient to rip those loose naturally tears a lot of soft tissue with it. When you deal with a fracture, it is not

(Testimony of Rodney Yoell.)

only the bone that is involved, but quite often the bone will heal and the injury to the soft tissue, scar tissue, still remains, and you have a greater pain from soft tissue damage than you will have from the bony injury itself.

Q. Last Monday when you saw him did you see muscle spasm?

A. Yes, he had some pain from muscle spasm when he was bending forward on extreme motion.

Q. As he bent over all the way——

A. Yes.

Q. ——he told you it hurt him?

A. Yes, and you could see what we call muscle spasm. There is a little inequality there of tension of the two muscles. It was not much, but it was some.

Q. Did you note it any place in your records?

A. Probably it was on a disc on my dictagraph up there. These are sort of courtroom notes. It is not a complete record.

Q. Speaking of courtroom, when you examined him last week that was for the purpose of testifying at this trial, was it not? [207] A. Yes.

Q. You knew that the trial was coming up?

A. Yes, but who I was testifying for or what about I do not know yet.

Q. After you left the hospital, can you tell me the first time you saw him? I think it is on that yellow sheet, is it not, Doctor?

A. I saw him in June—4th, 18th; July 11th, 15th, 24th, 31st; September 4th, 7th; October 20th,

(Testimony of Rodney Yoell.)

29th; I saw him on November 1st; I saw him the 2nd of December. As he was gradually improving his visits got less frequent.

Q. After December 2nd, 1952, when is the next time you saw him?

A. The 17th of December, 1952.

Q. The next time?

A. The 30th of December.

Q. And the next time?

A. The 8th of January, 1953.

Q. And the next time?

A. February 10th, 1953.

Q. Was February 10th, 1953, the last time you saw him up until last Monday?

A. It probably was. That is the best of my recollection.

Q. Going back to your findings, the first time you saw him after he left the hospital June 4th, 1952, you have a note [208] there, "Improving"?

A. Yes, to report in 10 days.

Q. He came back in 10 days, and what is your note on the 18th?

A. Improving. States vision is poor. I received permission to send him to an eye specialist to check his vision.

Q. Did that complaint of his vision have anything to do with the injury that he received in the accident?

A. I do not think so.

Q. You saw him on July 11th, and what is your report on that date?

A. I had a consultation with Dr. George Hos-

(Testimony of Rodney Yoell.)

ford about his findings. I secured permission to have his eyes examined and then I rechecked the X-rays.

Q. You also have a notation, "Improving," do you not? A. Yes, sir.

Q. On July 15th you have a notation, "Gradually getting off crutches," is that right?

A. Yes, sir.

Q. On July 24th the notation is, "Progress satisfactory"? A. Yes.

Q. On July 31 you have the notation, "Improved"? A. Yes, sir.

Q. On September 4th you have the notation, "Improving"? A. Yes, sir. [209]

Q. October 7th?

A. "Pain in right ankle and right knee on sitting rotation." I told him to stop wearing his cane.

Q. To discard his cane?

A. To discard his cane gradually.

Q. On October 20th, 1952, you have the notation, "Improving, to return in one week"?

A. That is right.

Q. On October 29th you have the notation, "Improved," is that right? A. Yes, sir.

Q. On November 1st you have the notation, "Improving"? A. Yes.

Q. And "Flexion o.k."?

A. That is right.

Q. What do you mean by "flexion," Doctor?

A. Forward bending satisfactory, forward flexion.

(Testimony of Rodney Yoell.)

Q. Then you have——

A. "Practically no limp."

Q. That was the notation, "Practically no limp"? A. Yes.

Q. "And to return in 10 days"?

A. Yes, sir.

Q. On December 17th you have no notation.

A. No. [210]

Q. December 30th you have a notation, "Gradually improving." January 8th, 1953, you have a notation——

A. "Improved. Report in 10 days."

Q. When you saw him February, whatever that date is, in 1953, did you discharge him to go to work at that time?

A. I thought he could go to work in June 1953. That was my opinion as of December. I thought it would be six months before he would get back to work. Now, the reason I haven't got the full report here, that return to work as of such a specific date, that he was no longer under insurance care, and there was no report turned in after that. He was coming to see me, but at my last report, I thought it would take about six months. So I figured he would be able to get back to work some time in June, 1953.

Q. And you so reported, I believe, in December of 1952? A. Of 1952.

Q. Before we get to that, Doctor, this yellow sheet that I hold in my hand, that is the notes of the daily—not daily visits, but the times he came

(Testimony of Rodney Yoell.)

into your office? Are those your complete notes on those particular visits? A. Yes.

Mr. Taylor: We would like to offer those in evidence, Your Honor.

Mr. Gerhardt: No objection, Your Honor. We will ask that the report just referred to, from which the doctor [211] refreshed his recollection, also be offered. That is the December 2nd report.

(The notes of daily visits were thereupon received in evidence and marked Defendant's Exhibit B.)

Mr. Taylor: Let me ask him some questions about that report.

Q. Doctor, you have referred to a report dated December 13th, 1952, and that was a report to Mr. Lloyd E. McMurray, one of the attorneys for Mr. Williams, is that correct? A. Yes.

Q. And you have a yellow copy in your file. In this report you have listed the fractures that you found in your earlier studies of Mr. Williams, is that correct? A. That is correct.

Q. And I believe you said that insofar as the fracture of the right side of the pelvis, there was a moderate separation of the fragments?

A. That is correct.

Q. Did that fracture ultimately heal?

A. Yes. Wait a minute now. Will you please tell me which fracture we were referring to? There is one here—you have another X-ray report there?

Q. Here are two X-ray reports. Is that what you are looking for? [212] A. No, sir.

(Testimony of Rodney Yoell.)

Mr. Gerhardt: Are they in the St. Mary's Hospital records, Doctor?

Mr. Taylor: The reports in evidence do not contain X-ray findings, Your Honor.

The Witness: Are you asking, sir, with respect to which?

Mr. Taylor: Q. I am asking you with respect to item No. 1 on your report.

A. "Right side with moderate separation of the fragments. He sustained the following injuries."

Q. My question is this: As to that fracture on the right side of the pelvis, did it ultimately fill in with callous?

A. The 4/10 X-rays show it had not.

Q. You have later made reports on that, haven't you, Doctor?

A. I am trying to follow them in sequence. The reason I am hesitating, there was one that was very slow to heal. It says the fracture referred to there, that I am referring to in item 1 on the 4th, showed beginning of healing—that was on the 10th of April—and then on May 12th there was a minimal amount of callous. The healing was progressing. No change of the fragments. Callous is not abundant, beginning to form. That is all the fractures.

And then the next examination shows a fractured neck of the femur, old healed fracture by the pubis. "Ununited fracture [213] of the tuberosity on the right side that overrode a deformity." That was in July. This is September. "Old healed fracture of

(Testimony of Rodney Yoell.)

the neck of the right femur." So as late as September one fracture had not healed.

Q. As late as September 1952?

A. Yes, sir.

Q. Were there any checkup X-rays on that particular fracture?

A. No, I think that was the last. It seems to me some of the X-ray records are not here.

Q. I call your attention to the paragraph in the letter of December 15th which says, "Fractures were treated and healing has been satisfactory."

A. Yes.

Q. Would that indicate that there had been a filling-in of these fractured areas?

A. So that by December 12th, 1952, there had been healing of the fractures?

A. That is right, with the exception of one. One fracture apparently had not healed.

Q. Does it say so in this report?

A. Not in this one.

Q. I believe you stated that one of them showed there was an overriding fragment, which you said would be permanent, in your direct testimony.

A. Yes. [214]

Q. Can you tell me the degree of overriding?

A. I have the pictures. I could show it to you. It was my impression it was about $\frac{3}{4}$ inch overriding.

Q. That is an overlapping?

A. It is an overlapping about like that.

Q. But there was union? A. Yes.

(Testimony of Rodney Yoell.)

Q. Was that a firm union? A. I think so.

Q. So there wouldn't be any rubbing back and forth in the area?

A. No, not of the fracture line, but it would tilt the pelvis. It would tilt the hip.

Q. Did you make any measurements of Mr. Williams to determine whether or not there is any shortening of either side or any tilt of the hip joints?

A. He has no shortening of his legs. He had no shortening of his legs, but there is a demonstrable tilt in the access of the two hip joints.

Q. Pardon me?

A. There is a demonstrable——

Q. Do you have any notes on that that shows the amount?

A. Not X-ray pictures. At least I hadn't them. He has a difference between his right and his left socket and a [215] deformity of the head of the femur from the fracture there. If I can see the X-ray pictures, I can show it to you.

Q. I don't have the X-ray picture. What is this notation on the face of Defendant's Exhibit A, "Normal shape"?

A. "Motions o.k. and normal shape."

Q. What part of his body were you talking about when you said it was a normal shape?

A. Talking about the trunk on the pelvis, the torso on the pelvis as he stands.

Q. So that as he stands with his back in a nor-

(Testimony of Rodney Yoell.)

mal shape there wouldn't be any tilting, would there, Doctor?

A. Not of his spine, not of the transverse processes, not of the spine and the pelvis. In other words, the bones of his vertebra stood on his pelvis all right, but it is his pelvis that is twisted.

Q. When you saw him this week, June 6, 1955, was there any evidence of any limp?

A. Slight limp.

Q. Do you have it marked any place?

A. No, no, I know I have it on the disc. By the disc I mean the soundsciber. I have a soundsciber and I talk into it and listen to it.

Q. In your report of December 15th—and that is December 15th, 1952—you said he walked with a limp but it isn't marked. You mean by that it is hardly noticeable?

A. I would call it a slight limp.

Q. A very slight limp?

A. Slight. Now, I would call it very slight. [216]

Q. In other words, there has been an improvement since December 19th, 1952? A. Oh, yes.

Q. Do you know when Mr. Williams returned to work? A. No.

Q. I think you referred to it before; in your letter you thought it would be about six months after December 1952? A. Yes.

Q. When he came in this week he told you he had been working as a stevedore, did he not?

A. Yes.

(Testimony of Rodney Yoell.)

Q. You had never seen Robert Williams as a patient prior to the date of his injury, had you?

A. No.

Q. So you do not know whether he had a limp prior to that time, do you? A. No.

Q. You do not know whether he was a person who moved slowly or rapidly before the accident, do you?

A. I imagine he was pretty active.

Q. You do not know that, though, do you, Dr.?

A. I would say he was a quick mover. I can't conceive of a man who has built a physique being slow, lethargic or hesitant in his motions. He is a pretty heavily muscled, well developed man. Of course, that is an opinion. [217]

Q. You had him bend over last Wednesday?

A. Yes.

Q. He could touch the floor?

A. Yes, he could get down and touch his fingertips, bring them down to the floor. But the last six inches was somewhat painful, slower, and some evidence of muscle spasm, in touching.

Q. But he could touch the floor?

A. He could touch the floor.

Q. Did he have any limitation of motion last Monday when you saw him?

A. Yes, I considered that last six inches a limitation of motion. In other words, he gets down to the point where he stretches the muscle and then there is a moderate amount of pain. Of course, pain is an interpretative thing. It gets down to where his

(Testimony of Rodney Yoell.)

back would hurt him. It would slow him down. He could get down there. It wasn't a fixation.

Q. It was not a true limitation in that he could not go any further?

A. No, he could touch the floor.

Q. He told you it hurt when he was doing the last six inches? A. About the last six inches.

Q. That is a subjective complaint?

A. Yes, but he had muscle spasm with it, which is objective.

Q. Any other objective findings with reference to the [218] injuries that Mr. Williams received, when you examined him last Monday?

A. Yes, he had pain in his right hip on extreme abduction and on extreme flexion and on extreme extension.

Q. Could he flex his right hip?

A. Almost completely.

Q. There was no limitation of motion of flexion of the right hip, was there? A. Slight.

Q. By slight you mean very little, is that right?

A. Very little.

Q. How about the abduction?

A. Abduction was moderately limited.

Q. Could you tell me in figures or amount?

A. I would say it was cut down by 8 to 10 degrees.

Q. And the extension of his hip, did he have full extension?

A. He had a little limitation of backward extension.

Q. Very slight limitation of extension?

(Testimony of Rodney Yoell.)

A. Slight.

Q. Those were objective findings?

A. Yes, sir.

Q. Are there any other objective findings besides this motion of his hip and the bending over motion, touching the floor?

A. Except for every limp that you would catch if you were [219] looking for it, no.

Q. Then that would be all the objective findings?

A. All the objective findings. Physical examination. I have had no X-rays made.

Q. This nerve damage that you refer to is something that has cleared up so far as you can tell?

A. I think it has cleared entirely.

Q. Did you prescribe any treatment when you saw him on June 6th? A. Yes.

Q. What?

A. I told him after he got through work to take a good warm tub bath and once in a while take some Alkaseltzer to relieve his soreness.

Q. Anything else? A. No.

Q. You did not recommend any physiotherapy or anything like that?

A. No, I didn't think it necessary.

Q. Did he tell you how long he worked before his back hurt?

A. He told me it depended on the type of work that he was doing. He said if he were jitney driving he got along pretty well but he would have to get out of the seat after three or four hours. He said he couldn't do a full shift without getting out to get

(Testimony of Rodney Yoell.)

a rest, but in lifting, or that sort of [220] shoving or pushing where it was heavy, would tire him out rather quickly.

Q. My question is how long a period of time did he do those things?

A. He said it took him, it began to get him towards the end of his work. He would work about five or six hours, quite a while, and after that it would begin to bother him, and if he goes to a movie and sits in a theater for a couple of hours or an hour and a half or so, his back hurts him a little bit.

Q. These jitneys that you speak of, are those the little machines that run around the docks?

A. Yes.

Q. They have lifts on the front of them?

A. They have fork lifts. Some of them have derricks. They have a seat that is like the seat on a John Deere Harvester. Some of them have flat seats, but those have little basket seats.

Q. Those things bounce along the tracks?

A. Yes, they pick cargo up. Some have a lever that works this way. Some have almost an automatic shift. There is quite a nepotism among the foremen as to who drives which.

Q. This traumatic arthritis that you mentioned in your testimony, is there any evidence now that he has any traumatic arthritis?

A. Well, there was evidence when the last X-rays were taken, [221] which is still present, in all probability. I have not rechecked them, but I have never known of any cases where the hip socket was

(Testimony of Rodney Yoell.)

smashed in like that and then healed, where there was final absorption, although it might occur.

Q. Is there any evidence at the present time that he is suffering from traumatic arthritis?

A. I think the pain in his hip is due partially to arthritis and partially to scar tissue in the muscle, and I think the pain in his back after lifting or sitting or climbing a great period of time is somewhat due to arthritis. It is pretty hard to separate which is due to the arthritis and which is due to the muscle spasm.

Mr. Gerhardt: In view of the doctor's testimony, Your Honor, I do not intend to use these X-rays, if Mr. Taylor would like to use them——

Mr. Taylor: I have no desire to, thank you.

Q. Does he have pain in his hip at the present time?

A. Yes, he says his hip hurts him and his back hurts him after he has worked for a while and used it, and the heavier the work, the more quickly the pain comes on. It does not bother him so much when he is doing comparatively light work, but indeed it wakes him up at night. If he lies on that side too long he has to shift his position, and also sitting in a movie or sitting in a hard seat, after about an hour or so he shifts. It bothers him. [222]

The Court: Does that have to do with the circulation?

A. I do not think, Your Honor, it would be the circulation. You can't disturb the circulation of the hip in sitting. I think it is due to muscle stretching

(Testimony of Rodney Yoell.)

and pulling at an angle that it is not intended to pull. In other words, the muscles, when a man sits normally he can sit squarely on both cheeks of his buttock. He has cushions there to protect him. If he has a little tilt, the angle of the bone which you sit on is definitely fractured, there is a deviation there, and that puts a stretch on the muscle and it would tire more easily. It is a strained position.

The Court: Q. What is your thought in relation to a bed patient and the necessity of getting him out of bed and around? What does that do?

A. The quicker you can get motion into joints the better it is.

Q. That has no relation to the circulation at all.

A. Oh, yes, the circulation has to improve, but I thought you meant would this pain be due to a stoppage of circulation, such as if you put an arm over a bench, cutting off the circulation.

Mr. Taylor: Q. This pain that you describe, did I understand you correctly that is because of muscle pulling?

A. Yes, a muscle staying in a——

Q. Cramped position?

A. Yes, sir. I can explain it. Take any normal group of [223] motions. You have a normal rotation of the hand. You can turn your hand like that. If you get a fracture of the wrist, which is a common fracture, particularly in the center, you fall on the hand like that, one of the results is a stiff wrist, and your motion is limited, and if you go beyond that or you use that, the muscle which normally allows you to complete that motion has been torn

(Testimony of Rodney Yoell.)

and ruptured, there is scar tissue and it is sore. It is just as if you bent your thumb back beyond the normal range of motion. That is the probable explanation of some of this muscle pain and joint pain after fracture. It is not entirely clear, but it is found in cases that have no relation to injury whatsoever.

Q. That is not arthritis, is it, Doctor?

A. No, arthritis is an inflammation of the joint, a pathology, an inflammation of the joint, the joint surface.

Q. Arthritic changes are shown in the joint?

A. Arthritic changes are shown in the joint.

Q. Roentgenologists generally report arthritic changes in the joints when they make their reports, don't they?

A. If there is arthritis there.

Q. That would be one of their findings?

A. That would be one of their findings.

Q. In any of the X-ray reports that you have is there any evidence of any arthritis? You may look at them if you wish.

A. Yes. I know myself, because you can see the hip socket [224] pretty badly smashed and bone crowded down into it. That is a traumatic arthritis. You can see it. You do not have to have a report on it. It is there.

Q. But it is in none of these reports, is it, Doctor?

A. No, but it is in his hip. It is his hip that hurts him, not the report.

Q. I appreciate that, but it would seem if there

(Testimony of Rodney Yoell.)

was any arthritis, it would be in the report, wouldn't it?

A. Not necessarily, no. The roentgenologist—some put things in, some leave them out. No doctor is infallible, surgeons or anybody else. It is not an exact science by a long shot. But I can show you or anyone that that hip joint, especially the right, was pretty badly banged up, and he has a shortening of the neck of the femur, and he has a rather bad head of the bone there.

Q. Whether it is banged up or not, at the present time he has very good motion of it except for the slight limitations that you have mentioned?

A. Yes, that is right. Yes, he has a good functional hip.

Q. It is a good usable hip?

A. It is a good usable hip within limitations.

Q. Within the limitations that you have mentioned? A. yes, sir.

Mr. Taylor: No further questions. [225]

Mr. Gerhardt: If your Honor please, I only wish to have introduced into evidence the report of December 12, 1952, that the doctor used to refresh his recollection from.

Mr. Taylor: May I see it?

Mr. Gerhardt: That is the one you referred to, counsel.

Mr. Taylor: Yes.

Redirect Examination

Q. (By Mr. Gerhardt): By the way, doctor, I

(Testimony of Rodney Yoell.)

notice attached to that report is a bill which was rendered subsequently, and you have the original here, which is already introduced into evidence as Plaintiffs Exhibit 15, and it is marked, your bill being in the amount of \$260, December 15, 1952, to Mr. Robert Williams, and it is marked "Paid. 1/16/53." Does that refresh your recollection that you did make a charge after the compensation payments were cut off? This is the one that is in evidence already, doctor, Plaintiff's Exhibit 15; this is the one to Robert Williams from your office, and which is marked "Paid 1/16/53."

A. Apparently the secretary sent him a bill, which is paid, which I didn't recall.

Mr. Gerhardt: If your Honor please, I have asked that the report of December 15, 1952, which was used by the doctor to refresh his recollection, be admitted in evidence.

The Court: It may be admitted and marked next in order.

(The report referred to was thereupon received in evidence and marked Plaintiff's Exhibit 23.) [226]

Mr. Gerhardt: No further questions.

Recross Examination

Q. (By Mr. Taylor): Doctor, you are employed by the American President Lines as a physician, are you not? A. I am Chief Surgeon, yes.

Q. Are you on a salary?

A. Yes, a retainer.

(Testimony of Rodney Yoell.)

Q. A retainer? A. Yes.

Q. How long have you been connected with American President Lines as a physician?

A. Ever since it has been the American President Lines.

Q. And that was when?

A. I think in 1933 or 1934, maybe a little later than that. Mr. Walker is here. He could tell you.

Mr. Taylor: Thank you, doctor.

CHARLES M. HAID, JR.

was recalled as a witness, and having been previously duly sworn, testified as follows:

Mr. Gerhardt: I have only a few questions for Mr. Haid, your Honor. In view of the time involved in this matter and to save counsel's and the Court's time, I am not going into the services that were rendered by Mr. Haid as demonstrated by the next to the last exhibit, which was a bill of \$5,000. I think, your Honor, rather than to go into all of that, and in [227] view of the testimony that has already been given, we will leave the matter entirely to the discretion of the Court, and I will ask for the withdrawal of Plaintiff's exhibit Number 22 and not offer any further proof at all of the services that were performed in the defense of the case. Is that agreeable?

Mr. Taylor: Surely.

Direct Examination—(Continued)

By Mr. Gerhardt: Q. Mr. Haid, you have listened to Dr. Yoell's testimony here today?

(Testimony of Charles M. Haid, Jr.)

A. Yes.

Q. Were you given a copy of that report of his of December 15, 1952 that has just been introduced in evidence? Let me show you that report.

A. Yes, I was, Mr. Gerhardt.

Q. Is that the one that you referred to this morning as being the report that you had?

A. Yes.

Q. Can you tell me whether you took into consideration the factors that were outlined in this report?

A. Yes, I did. I might add in that regard, Mr. Gerhardt, I have known Dr. Yoell, I have received reports from him for many years in connection with accidents where he examined injured seamen or stevedores, and my own impression was that Dr. Yoell was always very conservative. In other words, he was optimistic as to the chances of recovery, and I took that [228] into consideration, too.

Q. Mr. Haid, during Dr. Yoell's examination, there was introduced into evidence a notice from John Black's office——

A. I believe I know what you are referring to.

Q. You were in court and heard the testimony. There was a notice from John Black's office to Dr. Yoell, and written on behalf of the Fireman's Fund Indemnity Company, who were acting as the insurance carriers for Marine Terminals, to stop compensation.

A. Yes.

Q. Prior to the conclusion of the settlement in this case did you have any discussion with Mr.

(Testimony of Charles M. Haid, Jr.)

Black's office pertaining to the settlement of this case? A. I did.

Q. Do you recall about when that was?

A. My best recollection is it was shortly after some rather extensive negotiations with Mr. McMurray and Mr. Andersen about the middle of December, 1952. I was well aware and had been advised, initially through the Marine Terminals report of the injury that Fireman's Fund was the compensation carrier, and knowing, of course, that Mr. Black was the attorney for the Fireman's Fund in these matters—and I believe also that we had quite early established that Mr. Black was being furnished copies of the reports from time to time from Dr. Yoell concerning the examination of Mr. Williams for his use [229] and benefit in connection with the compensation payments—so I therefore contacted Mr. Black on behalf of the Fireman's Fund, the compensation carrier, and of course, Marine Terminals Corporation to recall to his recollection the fact that Mr. Williams had filed his notice of election to sue American President Lines and that the suit had been filed, and so forth, and that the matter had been—I had taken Mr. Williams' deposition and investigated the case, and so forth, and that we were—I was now in a position of either having to go to trial or settle the case within, oh, a month or five weeks, something of that sort, and called to his attention the fact that it appeared from my investigation and what not, the legal research, that the liability was that of

(Testimony of Charles M. Haid, Jr.)

Marine Terminals Corporation rather than that of American President Lines, and discussed at some length with him the matter of the right of indemnity over.

Q. Did you discuss with him the amount of the settlement?

A. Oh, yes, I did. I called to his attention the fact that our settlement negotiations had been going on and the amounts involved and what the flat minimum demand was of Williams' attorneys.

Q. Did you advise him with respect to the amount that was paid, that you were going to pay in settlement of this case or the amount that you thought you might pay?

A. My recollection of that is that we thought that—as of [230] about the middle of December or thereabouts I advised him I had received this flat minimum demand of \$75,000, but that I was continuing—I was hopeful that through further negotiations I would be able to reduce that amount, and Mr. Black advised—I had several telephone discussions with him at one time or another and I believe I saw him in his office, and he stated to me that he was giving the matter of legal liability, of settlement and so forth, and negotiations, his active attention.

I got right down to the wire with regard to the trial date on January 16th, 1953, and not having received any answer from Mr. Black for, oh, a week or so as to what it was that he was doing or what his views were, I finally concluded the settle-

(Testimony of Charles M. Haid, Jr.)

ment to the best of my ability at that time with Williams and his attorney.

Mr. Gerhardt: Thank you. That is all.

(A recess was taken to 10:00 a.m. Friday,
June 10, 1955.) [231]

The Clerk: American President Lines vs. Marine Terminals Corporation, further trial.

CHARLES M. HAID, JR.

a witness called on behalf of the plaintiff, was recalled and having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Taylor): Mr. Haid, did you handle the pleadings in the case of Robert Williams against APL? A. Yes, for the defense.

Q. For the defense? A. Yes.

Q. Did you set up an answer? A. Yes.

Q. In the answer did you deny negligence on the part of APL?

A. I believe I did, yes. I have not looked at the answer, Mr. Taylor, recently, but if negligence had been alleged, and I believe that it was, I did deny it.

Q. Did you deny unseaworthiness?

A. Yes. You can't very well concede those things, Mr. Taylor.

Q. Did you set up the defense of contributory negligence? A. I believe I did.

Q. Did you set up any other special defenses, Mr. Haid? [232]

(Testimony of Charles M. Haid, Jr.)

A. As I recall it, Mr. Taylor, I did set up a special defense to the effect that the negligence and the unseaworthiness, if any, was caused by Marine Terminals Corporation, in an effort to take advantage of the various decisions in the Circuit Courts to the effect that, as the law was then, where a stevedoring company takes control over an area and causes something, the liability then is not that of the steamship company but rather that of the stevedoring company.

Q. These pleadings were filed in the State court?

A. Yes.

Q. Did you file a cross-complaint in the State court against the Marine Terminals?

A. There is no provision for that in the State court, Mr. Taylor.

Q. Did you file any type of pleadings to intervene Marine Terminals in the State court action?

A. No, I did not. There is no provision in the law of the State of California for interpleader in that manner.

Q. What facts did you have at your disposal as the basis for the denial of unseaworthiness?

A. Really none, to tell you the truth, Mr. Taylor. As I received advices, received the file, such as there was with respect to the accident, it appeared to me the liability with respect to unseaworthiness was quite clear, but I was certainly not going to concede that in the pleading stage and have [233] somebody take a judgment based upon the pleadings.

(Testimony of Charles M. Haid, Jr.)

Q. Was there an investigation made and was that investigation available to you when you filed your answer in the State court?

A. I believe so.

Q. You filed your answer after reviewing the investigation that had been made up to that time?

A. Yes.

Q. Did you make any motions to strike any portion of the complaint filed by Robert Williams?

A. No.

Q. Was there any attempt made to transfer the State court action to the Federal court?

A. As of the time that the file was referred to me for defense the statutory time within which transfer could have been accomplished under the Federal Rules of Procedure had expired; so I was in no position to do so, when I received the complaint, so I did not make a motion to transfer because I was time barred.

Q. Did you notify the Marine Terminals, or did your office notify Marine Terminals that the Williams vs. American President Lines complaint had been filed?

A. In writing or orally?

Q. In any way.

A. I do not believe I did so immediately after receiving the complaint, but I know that I did later on orally. [234]

Q. When was that that you first notified the Marine Terminals of the filing of the Williams suit?

A. That was, to the best of my recollection, during December 1952, and I did not notify Marine

(Testimony of Charles M. Haid, Jr.)

Terminals Corporation as such, but, rather, John Black, attorney for the underwriter for Marine Terminals.

Q. So that your best recollection and your testimony is that you at no time notified Marine Terminals directly with reference to the filing of the Williams suit?

A. I believe that is correct.

Q. Did you or anyone in your office ever make a demand upon the Marine Terminals to defend the action of Williams against American President Lines?

Mr. Gerhardt: We have stipulated, I believe, your Honor, that we did not. Isn't that correct, Mr. Taylor? A direct demand to defend?

Mr. Taylor: Yes——

Mr. Gerhardt: Let the witness go ahead and answer.

The Witness: No, I made no direct demand upon Marine Terminals as such.

Mr. Taylor: Q. That is a demand to take over the defense of the American President Lines?

A. That is right.

Q. So we understand each other.

A. Yes. But that was, however, among the subjects of the [235] conversation later on with Mr. Black.

Q. Did you give Marine Terminals any notice of the settlement that was going to be made?

A. Through their attorney, Mr. Black, I did.

Q. You gave a notice to Mr. John Black?

(Testimony of Charles M. Haid, Jr.)

A. Yes.

Q. Was that in writing or was that verbally?

A. That was verbal.

Q. When was your first verbal information to Mr. John Black given with reference to the notice of settlement?

A. About the middle of December, 1952. When I say about the middle—around about that time.

Q. How was that information conveyed to Mr. Black?

A. My best recollection at the present time is, Mr. Taylor, since I had occasion to discuss various things with Mr. Black on other cases from time to time, either in person or over the phone, I think the first time that I notified Mr. Black about this situation was probably over the phone.

Q. You recall it was a telephone conversation?

A. Yes.

Q. Did you ever follow that up with any letter to him? A. No, I did not.

Q. Is there any correspondence between your office and Mr. Black's office concerning the settlement of Marine Terminals? A. No. [236]

Q. The settlement of the Williams case?

A. No.

Q. In this first telephone conversation that you had with Mr. Black, which you believe was about the middle of December 1952, what did you tell him and what did he say to you about it?

A. Well, it is pretty hard to remember exactly what was discussed, because we had more than one

(Testimony of Charles M. Haid, Jr.)

discussion about the entire matter. But my best recollection is that I advised him of the pendency of the Williams case against the American President Lines, discussed with him some of the facts of the matter, as to the liability of American President Lines, and I also believe—and I see no reason to believe otherwise—that we discussed generally the nature and extent of Mr. Williams' injuries, because I had been advised that copies of Dr. Yoell's reports had been forwarded to Mr. Black's office from time to time, because they were the attorneys for the underwriters in the case.

It is also my recollection that I discussed with him the fact that the plaintiff's attorneys had initiated settlement discussions with me concerning the case as such.

Q. Did you tell him what the demand was?

A. I believe I did.

Q. What did you tell him in that regard?

A. I believe I told him exactly what they told me. [237]

Q. And that was what?

A. That their initial demand was \$90,000, and that they had finally come down, after considerable bickering back and forth between themselves and myself, to a flat minimum of \$75,000.

Q. Did you have more than one conversation with Mr. Black on this subject of settlement?

A. Yes, I did, Mr. Taylor. I can recall that. And, oh, I might mention to you also that Mr. Black and I discussed the problem of indemnity—

(Testimony of Charles M. Haid, Jr.)

that subject between American President Lines and Marine Terminals Corporation.

Q. Was that discussion regarding indemnity before or after the release had been taken?

A. Before.

Q. What was the tenor of your discussion in that regard?

A. Expressing my own thoughts with respect to the liability of Marine Terminals Corporation to indemnify American President Lines in respect to any verdict or settlement that might be reached, and Mr. Black's denial that there was any such right, and so forth—you know, the usual conversations that attorneys carry out among themselves.

Q. You were trying to argue for indemnity over? A. Yes.

Q. And he was arguing against it, is that right?

A. Yes, that is right.

Q. Was it your belief at that time that the sole liability in [238] the Williams case lay with the Marine Terminals? A. Yes, it was.

Q. What was the basis for that belief?

A. Because of the fact that, as the investigation of the case had developed the facts themselves, the problem of the missing safety lock, among other things, on that hatch beam was a matter that was known to Marine Terminals Corporation employees and, accordingly, the Marine Terminals Corporation, but was not known to American President Lines; but notwithstanding the knowledge of Marine Terminals Corporation, it went ahead and

(Testimony of Charles M. Haid, Jr.)

worked its men in the lower hold and the inevitable happened, just what the lock was designed to prevent, falling in the hold.

Q. You mention the absence of the lock, among other things. What other things did you take into consideration?

A. I do not quite follow you in that regard—all of the various facts that were developed as to the knowledge of the various stevedores. Is that what you are concerned with?

Q. I am just rephrasing part of your answer, as I understood it, that it was the absence of the lock among other things that led you to believe that the sole liability was with Marine Terminals.

Mr. Gerhardt: What do you mean by “sole,” counsel?

Mr. Taylor: That is what I asked him, if he believed the sole liability was with Marine Terminals, and he purported [239] to answer.

The Witness: I am sorry, Mr. Taylor. Perhaps I did not follow the entire question. It was my opinion at the time—and of course it still is—that the American President Lines was definitely liable as such to the injured man because of the unseaworthy condition of the vessel through that missing lock on the beam, but that under the circumstances of the facts as they were developed, that the primary liability in the case rested with Marine Terminals Corporation.

The Court: Counsel, so that I may follow this testimony, what is the purpose of the testimony?

(Testimony of Charles M. Haid, Jr.)

Mr. Taylor: Leading up to the basis for the settlement, your Honor, that was made with Mr. Williams.

The Court: With what result?

Mr. Taylor: It is our contention, your Honor, if the plaintiff in this suit believed that there was sole liability on the part of Marine Terminals, then they would have won the first lawsuit. The first lawsuit would have resulted in a defense verdict, and that any payment that was made was a donation or gratuity if they believed that. If they did not believe that there was sole liability, then I am interrogating him as to what they believed the liability was as a basis for the payment that was made, the settlement in the first suit.

The Court: Are there any of the cases that you have read [240] that has any relation to the proposition that you just presented to this Court? What cases, if any, could you suggest to the Court?

Mr. Taylor: Your Honor, it would appear that if there was a sole liability on the part of the Marine Terminals, and the ship company was not liable at all, then the liability of Marine Terminals would fall under the Longshoremen and Harbor Workers Act, because it was the Marine Terminals' employee who was injured, and there would not be, could be no recovery in a civil suit.

Mr. Gerhardt: If your Honor please, one of the stipulations in this case is that the vessel was unseaworthy because that lock on the beam was missing.

(Testimony of Charles M. Haid, Jr.)

Mr. Taylor: We are not prepared to stipulate that it was unseaworthy.

The Court: You have already done so.

Mr. Taylor: No, I think that is counsel's statement that it was unseaworthy. I do not know that we are forced to accept a position that it was unseaworthy.

Mr. Gerhardt: I do not know of any case that holds where a lock is missing that the vessel is seaworthy. I think all the cases hold that.

Mr. Taylor: I think we are getting into an argument of the case.

The Court: I was trying to follow the testimony. You [241] may proceed.

The Witness: Mr. Taylor, if there is any question in your mind as to the use of my words here this morning, if I said, "sole liability on the part of Marine Terminals," what I was endeavoring to convey to you was primary liability upon Marine Terminals and initial liability on the part of American President Lines to Williams for the unseaworthy condition, and then the problem of liability over between the shipowner and Marine Terminals—that is the question where primary, sole, and all that business, comes in.

Mr. Taylor: Q. Those words all have legal meanings, of course. A. That is right.

Q. But I am directing my questions to your testimony that the liability was that of the Marine Terminals rather than that of the American President Lines.

(Testimony of Charles M. Haid, Jr.)

A. Well, the American President Lines in this instance, I believe, was liable to Mr. Williams without fault. In other words, there was an absolute liability for the unseaworthy condition.

Q. Did you make a demand to Mr. Black that he contribute to the settlement that you proposed to make?

A. My best recollection about that, Mr. Taylor, is that I apprised him of the various things that I mentioned before I advised him of my views with regard to what the jury verdict [242] in the State court might be and what the flat settlement demand was by Williams' attorneys, and we talked back and forth about indemnity and various such things, and Mr. Black advised me that he would give the matter his very active consideration as to the question of contribution towards the settlement that might be worked out or just what his position would be under the circumstances.

Q. But did you definitely ask him to contribute?

A. Yes, I did, but I do not recall that any particular amount was mentioned.

Q. But you did ask him to make a contribution?

A. Yes.

Q. Settlement was effected with a release dated January 16, 1953?

A. Yes.

Q. Is that correct?

A. That is right.

Q. Can you tell me when you started negotiating with the attorney for Mr. Williams?

A. To my best recollection, it was sometime after the taking of Mr. Williams' deposition during

(Testimony of Charles M. Haid, Jr.)

October of 1952, and probably during the early part of December, 1952, that they made a formal settlement—that they started settlement negotiations.

Q. With whom did you negotiate, Mr. McMurray or Mr. Andersen?

A. Initially with Mr. McMurray and thereafter with both Mr. [243] McMurray and Mr. Andersen.

Q. Approximately how many settlement discussions did you have with the attorneys for Mr. Williams?

A. Oh, I would say there were several during December, several more during January, and getting towards the time when the case was set for trial, January 16th, 1953, we had virtually continuous negotiations over a period of several days.

Q. Did you go to their office, or did they come to your office?

A. Oh, I would be in their office on one occasion, they would be in my office on another occasion, and then I would be back over there again.

Q. Would you give me a rough number of how many times you met with them to discuss the Williams case?

A. Oh, I would say four or five times.

The Court: Does this testimony have to do with the \$5,000 fee?

Mr. Taylor: Just leading up to the time that was spent in negotiating. It is my understanding the \$5,000 figure has been withdrawn, but it is being left up to your Honor as to what fee should be allowed. I am directing my questions to that.

(Testimony of Charles M. Haid, Jr.)

Q. Could you tell me how many hours you spent in negotiating the settlement?

A. It is hard to tell really, but I would believe that I had [244] initial discussions in December that last four or five hours on various occasions; I mean a total of four or five hours during December, and that during January it ran more than that.

Q. How many hours in January would you say, your best estimate?

A. Oh, about five, six, seven or eight, something like that.

Q. Six to eight hours in January?

A. Yes.

Q. You have been engaged in defense work, as I take it, for a considerable period of time?

A. Yes.

Q. Is your arrangement on a time basis?

A. What arrangement?

Q. Is your fee arrangement with your client on a time basis?

A. Not in all respects, no.

Q. You bill them for the time? You take that into consideration in arriving at your bill?

A. Oh, yes. The time is taken into consideration, but there are other factors in each case, as you well know.

Q. Now, you took one deposition, I believe?

A. That is correct.

Q. That took two or three hours, is that right?

A. Yes.

(Testimony of Charles M. Haid, Jr.)

Q. Did you make any court appearances in the Superior Court?

A. I do not believe that we had any formal court appearances [245] as such before any of the judges of the Superior Court on any matter. The various times when we were concerned with pleadings or extensions of the trial date, for example, we would handle that by means of a stipulation and discuss it with the Clerk of the Superior Court.

Q. You testified the payment of \$62,500 was made to plaintiff in settlement of this case?

A. Yes, that is correct.

Q. And one of the factors that you took into consideration was his wage loss. What were his earnings, Mr. Haid?

A. Approximately \$400 per month. That is to the best of my recollection now.

Q. I appreciate it has been several years. Just to refresh your memory from the deposition, you asked him how much he was earning, did you not?

A. Yes.

Q. And his reply in the deposition?

A. \$85 a week. That is what the deposition says, yes.

Q. And that is the figure that you were using in estimating his wage loss? A. Yes.

Q. The information that you had in the deposition, is that right?

A. I believe that I took an opportunity to check that with Pacific Maritime Association. I mean that would be the normal thing that I would do. I be-

(Testimony of Charles M. Haid, Jr.)

lieve that was done. I just don't [246] recall exactly, but that is an invariable practice that I have.

Q. I believe you said that you considered eighteen months off work, is that right? A. Yes.

Q. You mentioned a compensation lien.

A. That is correct.

Q. Did the Fireman's Fund or Mr. Black's office put you on notice of the compensation lien?

A. Verbally.

Q. Verbally?

A. In my discussions with Mr. Black I believe he mentioned that particular amount, about \$2,000.

Q. But you were not put on notice by lien form or anything? A. No.

Q. You did not pay any lien in addition to this \$2,000? A. I did not.

Q. So this \$62,000 was your gross payment?

A. Gross.

Q. I believe that you said that you observed Mr. Williams at the time of this deposition, and I believe you said that he was nervous. A. Yes.

Q. And that a recess was taken during the deposition.

A. On several occasions that I recall, that did occur. Mr. Taylor, when I say "recess," I mean not a formal recess where [247] everybody would adjourn for the outer chambers for a drink of water, but to let Mr. Williams get up and walk around the room for a few minutes.

Q. You say it was or was not that type of recess?

(Testimony of Charles M. Haid, Jr.)

A. That type of recess, and let him stretch his legs between answering one question and——

Q. Did he complain of nervousness in his deposition?
A. I believe that he did.

Q. Have you had a chance to review this deposition?

A. No, I have not. I have not seen that deposition for a long time.

Q. Can you point out in it where he complained of nervousness? Frankly, Mr. Haid, I couldn't find it, but it might be in there.

A. Mr. Taylor, if you can't find it, I'm going to have to ask Mr. Gerhardt whether he can find it, because rather than take up the Court's time pawing through the record—what is the situation?

Mr. Gerhardt: I would suggest that we let the deposition go in evidence and speak for itself.

Mr. Taylor: There are some legal objections to some of the portions of the deposition.

The Court: The deposition is here. Either side may use it for any purpose.

The Witness: I am not declining to answer the question, [248] Mr. Taylor. There are 43 pages of stuff there.

Mr. Taylor: Q. Did he tell you how his back felt?

A. I believe he complained about the condition of his back, yes.

Q. What did he say about how his back felt?

A. He said it hurt him. I am just going on

(Testimony of Charles M. Haid, Jr.)

recollection, I mean, but I can recall that he complained about that.

Q. Did you ask him how his back felt at the place where the vertebrae were broken?

The Court: If you have it in the deposition, read it to him.

The Witness: Yes, if it is in there, Mr. Taylor—I just can't recall everything that is in every deposition that I took, especially one I took in October, 1952, because there has been a multitude of depositions since. I just can't remember.

Mr. Taylor: Q. I can appreciate you have taken a lot of depositions, but yesterday on the stand you testified as to the factors you took into consideration in settling this case.

A. Yes, that is right, Mr. Taylor, but I did not say I based those factors completely on the matters that were set forth in the man's deposition.

Q. Do you recall what he said when you asked him how his back felt where the vertebrae were broken?

A. I can't recall that, Mr. Taylor, now. [249]

Q. I will ask you with reference to the question, "How does your back feel," on page 38, and what was his answer?

A. "The back feels fine."

Q. On page 40 you asked him, beginning at line 13 and down through 18——

A. I asked him about how the lower part of his back, other than the coccyx bone—"does that ever bother you?"

(Testimony of Charles M. Haid, Jr.)

"Answer: Do you mean—I don't understand you. Do you mean where the vertebrae——?"

"Question: Yes.

"Answer: No, that doesn't bother me."

Q. Would you take that to mean where the transverse processes were broken, it didn't bother him at the time of the deposition?

A. It is hard to tell, Mr. Taylor, exactly what Mr. Williams was talking about from time to time because of the fact that, as you—well, maybe you don't know Mr. Williams. Mr. Williams is not a very well educated man, among other things, and at the time his deposition was being taken, he was very nervous and a very irritable fellow at that particular time, and he appeared to me to be in considerable pain; and he had difficulty, frankly, in giving proper answers to questions. It was one of those things where you do the best you can with the witness at the time.

Q. Did he tell you how the fractures had healed in his pelvis or what somebody had told him how the fractures had healed? [250]

A. If it is in the deposition, he must have. I don't remember those exact things.

Q. Did you ask him what he had been told about his fractures and his answer was, "They said they have healed fine, fine, beautifully. He also told the other fellow that happened to be assigned to this particular place of taking the pictures, I presume that he was one of the officials, told me that my

(Testimony of Charles M. Haid, Jr.)

pelvic bones had healed beautifully." Do you remember that now?

A. Apparently he said so. It is in the deposition. But, of course, you like to cover those things when you take a plaintiff's deposition to see what a man has been told, but you do not necessarily rely upon what the man said somebody told him as to a medical matter in his back where he is a stevedore. You go to the doctors.

Q. Did you have him examined by an independent doctor?

A. I did not. I relied upon the report that I received from Dr. Yoell, who is an American President Lines doctor. He is the doctor I would have sent the man to in any event, so there is no use in duplicating effort.

Q. Didn't you tell us yesterday that you thought Dr. Yoell's report might have been optimistic?

A. Yes, I did so, and I believe that is correct. You see, doctors, as you well know, I am sure, Mr. Taylor, doctors who are hired to examine people on behalf of insurance carriers or [251] corporations of one sort or another, are usually fairly conservative in their approach to the extent and nature of a man's injuries, and they are usually optimistic as to the extent of his recovery, just as many doctors who examine injured people on behalf of their own selves are generally prone to perhaps put it on a little bit as to what it is the man has suffered from. You have to weigh those things.

Q. Did you know that Dr. Yoell was the only

(Testimony of Charles M. Haid, Jr.)

doctor who had seen Mr. Williams and had treated him?

A. I believe he was the only doctor who treated him, or, rather, that he was in charge of the case. I do not know whether any doctors out at St. Mary's Hospital had an active hand in the treatment, but I know he was the doctor who treated Mr. Williams, yes.

Q. Didn't you know, or didn't you appreciate the plaintiff's proof would depend upon statements made by Dr. Yoell on the stand; that is, proof of injuries?

A. Yes, I did, plus another doctor. Dr. Yoell was not the only doctor.

Q. Were you in the deposition that Mr. Williams testified at the time of the deposition he could bend over and touch his toes?

A. Did he say that in his deposition, Mr. Taylor? I don't recall.

Q. I think he was talking about the exercises that he was [252] doing, on page 27: "And what does he do when you go back to the office? Just look at you or what?

"A. Looked at me and asked how I am feeling. He has had me to sit down and cross my legs, and he has had me to stand up and touch my toes, bend and touch my toes.

"Q. Can you do those things? Can you touch your toes when you bend over?

"A. Yes.

"Q. Good for you. How about walking around?

(Testimony of Charles M. Haid, Jr.)

Can you walk pretty well without using the cane?

"A. Without using the cane?

"Q. Without using the cane.

"A. Yes.

"Q. When I say 'walk pretty well', I mean, do you have to shuffle or truck your legs or something of that sort? Do you walk without the cane?

"A. Yes.

"Q. And walk fairly well?

"A. Fairly well, yes."

Do you recall now that those statements were made in the deposition? A. Yes.

The Court: What is the date of this?

Mr. Taylor: October 7, 1952, ten months after the accident. [253]

Q. Now, I believe that you said that one of the factors you took into consideration was the age of the plaintiff. A. That is right.

Q. I think you said he was 31 at the time of the accident. A. I believe that is correct.

Q. And you took into consideration his life expectancy? A. Yes.

Q. What figure were you using on the life expectancy?

A. Whatever the figure was—what is the Commissioner's Standard Mortality Table of Life Expectancy?

Q. You were using that figure?

A. Yes.

Q. Do you recall what that figure was?

A. I don't recall the exact figure, no.

(Testimony of Charles M. Haid, Jr.)

Q. I think you said you had been furnished with a copy of Dr. Yoell's report of December 15, 1952?

A. Yes.

Q. Do you recall Dr. Yoell's conclusion: "There is no question that this man was severely injured. He has made an extremely satisfying recovery. At present it is too early for him to return to heavy work, and I think his period of continued disability should be from three to four months."

A. I recall that that was in there.

Q. You recall that that was in the doctor's report?

A. There is also a page and a half of other comment by the [254] doctor that was in there, too. You have to take the whole report into consideration.

Q. But you knew, did you not, that at the time of trial, if this case were tried, that Dr. Yoell would be bound by the statements that he had made in his report, is that not correct?

A. Just the statement that you read to me, Mr. Taylor, does not show the entire picture, because you have to look at the rest of that report and see what it was that Dr. Yoell was talking about as to the permanent disability that the man was going to have. There is more to it than just that factor, that he made a satisfactory recovery.

Q. Yes, the doctor told you that he had a definite limp, with limitation of motion in the right hip, and that there was a moderate amount, a mod-

(Testimony of Charles M. Haid, Jr.)

erate limitation of forward flexion of the spine. He told you that, didn't he?

A. That is right.

Q. But so far as the neurological examination was concerned, all the reflexes were present, were they not? A. Apparently.

Q. There is a statement here that there is no evidence of any other physical disability other than what he has already said.

A. Other than what he is talking about throughout his report.

Q. Is there anything in the report other than this definite [255] limp and limitation of motion of the right hip that looks to be of a permanent nature?

A. Well, the matters which are spoken of by Dr. Yoell in here are not the only things that I was concerned with in this case. I don't recall just how it happened to come about, but we got into this problem of the future onset of traumatic arthritis in the site of the fracture of the hip, even though it was not mentioned.

Q. In the report?

A. That was very definitely taken into consideration. But there was also taken into consideration not only the fact that he had injuries to his spine and to his pelvis, his hip socket and that sort of thing, but also the matter of what had happened to him mentally as a result of these things: the nervousness, the irritability, and the way he acted around the house, and the relationships with his

Testimony of Charles M. Haid, Jr.)

wife—all those things, because I went into that pretty thoroughly with Mr. McMurray and Mrs. Williams in the absence of Mr. Williams.

Q. Did you ever have him examined by a neurosurgeon or a neurologist?

A. No, I did not.

Q. Is there anything in this report that refers to nervousness, that is, the report of Dr. Yoell?

A. No, there is not. But I have a very definite recollection [256] that that subject was taken up by Mr. McMurray and myself with Dr. Yoell, and it was in the form of an oral conference, in conference or something of that sort with Dr. Yoell concerning matters over and above what was in that particular report.

Q. And did you take the deposition of Dr. Yoell?

A. No, I didn't take Dr. Yoell's deposition.

Q. Did you take the deposition of the custodian of the records of St. Mary's Hospital?

A. No, I did not.

Mr. Taylor: I have no further questions.

Mr. Gerhardt: If your Honor please, I merely wish the record to show also that the deposition contained the following questions: (Reading).

"Q. That is good. How about your feeling of any pain in your back since you have been off the crutches, does your back or your pelvis or any other part hurt you at any time?

"A. The pelvis bothers me at times.

"Q. Now, how does—what is it?

(Testimony of Charles M. Haid, Jr.)

"A. Pains there.

"Q. What? "A. A dull pain.

"Q. A dull pain. And do you know where that fracture was in the pelvis? Do you know what part of it it was? [257] "A. No.

"Q. And this pain that you feel, is that around your hips or in the——

"A. (Interrupting) Lower part of my buttocks.

"Q. On the right side?

"A. On the right side.

"Q. And how about your lower back?

"A. The coccyx bone.

"Q. Yes. How about that?

"A. When I sit up too long, when I can't sit on anything hard for a long period of time, I have to take a pillow along, and even by taking the pillow I get tired, then I have to twist and turn to kind of rest myself up like that. That is how I get relief, is twisting and turning.

"Q. Does your back or any part of your body at the end of the day after you have been walking around for any period of time——

"A. (Interrupting) Yes.

"Q. How does it bother you, how would you describe it?

"A. From my knee down to my ankle I get a dull ache, and if I exert myself too much my leg will cramp on me in the fat part of the thigh.

"Q. Both legs? [258]

"A. Just the one. My heels usually, as a rule, if I do too much walking with the cane or without

Testimony of Charles M. Haid, Jr.)

t, doesn't make any difference, my heels get kind of—they feel sort of like they have been on a strait jacket or something, some kind of a clamp been pressing on them, something that has been pressed on them. And it affects me sexually, intercoursing at times it bothers me afterwards and sometimes while it is in the process.”

That goes through to Page 40, line 9.

Mr. Taylor: At this time, your Honor, I am going to move to strike the portion of the deposition, the last sentence just read: “And it affects me sexually, intercoursing at times it bothers me afterwards and sometimes while it is in the process,” as not responsive to the question that was asked, and this deposition was taken subject to all motions to strike.

Mr. Gerhardt: If your Honor please, we are not using this deposition for that purpose insofar as any examination of Mr. Williams is concerned. Counsel has asked the witness on the stand as to what factors he used, and he said he used the deposition, and that is part of the testimony in the deposition that he used. I am offering it merely for that purpose.

The Court: I will allow the questions and answers to stand. The objection is overruled. [259]

Mr. Gerhardt: No further questions.

Mr. Taylor: No further questions.

Mr. Gerhardt: If your Honor please, we have ascertained the wage rates and increases and I have discussed these with Mr. Taylor. He has checked

on them, and we have stipulated that the data here on this sheet dated June 9, 1955 may be received in evidence as Plaintiff's Exhibit next in order.

The Court: Any objection?

Mr. Taylor: No objection, your Honor.

The Court: It may be admitted and marked.

(The wage rates referred to were thereupon received in evidence and marked Plaintiff's Exhibit 24.)

Mr. Gerhardt: If your Honor please, the exhibit from the Pacific Maritime Association that pertains to the man's earnings, Plaintiff's Exhibit Number 11, shows for the first two quarters of 1950 there were very few hours put in, and I had asked Mr. Taylor to check, because it was my understanding that that was just before the beginning of the Korean war. Shipping was slow and loading and discharging of cargo was at a minimum ebb, and if it is a matter of common knowledge, we could stipulate to it.

Mr. Taylor: I'm sorry. I just overlooked that as far as checking is concerned. I have no personal knowledge one way or the other.

Mr. Gerhardt: I will leave that, then, unless you want [260] to check later.

Mr. Taylor: That is satisfactory.

Mr. Gerhardt: If your Honor please, I will reoffer again the Safety Rules which have been admitted for identification only. It is Plaintiff's Exhibit 18. I will offer that in evidence in the light of the testimony of the longshoremen.

The Court: Let it be admitted and marked.

Mr. Taylor: We make the same objection to that portion of the offer.

The Court: The objection will be overruled. Let it be admitted and marked.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 18.)

Mr. Gerhardt: The Plaintiff rests, your Honor.

The Court: We will take a recess.

(Recess.)

Mr. Gerhardt: If your Honor please, based upon a discussion during recess and a checking of the exhibits, I find that we still have two exhibits which are in only for identification. One is Plaintiff's Exhibit Number 21, which is the deposition of Robert Williams, and based upon the testimony that has been presented, I offer that deposition in evidence.

Mr. Taylor: We object to certain portions of that deposition, certain legal objections, such as unresponsive [261] answers, questions that would be subject to legal objection, where the same question asked of the witness on the stand.

The Court: Subject to that qualification, it may go in.

Mr. Taylor: My only objection is the legal objections that would be available to the party opposing the deposition.

Mr. Gerhardt: It may be admitted on that basis, your Honor?

The Court: For that limited purpose, I will allow it.

(The deposition referred to was thereupon received in evidence and marked Plaintiff's Exhibit 21.)

(Thereupon a motion to dismiss was made by counsel for the defendants on the ground that the evidence does not show any action over for indemnity against the defendant, Marine Terminals Corporation. The motion was argued, and at the conclusion the Court made the following ruling:)

The Court: For the purpose of the record, the motion will be denied. We will recess until Monday morning at 10:00 o'clock. [262]

Monday, June 13, 1955, 10 a.m.

The Clerk: American President Lines vs. Marine Terminals Corporation, further trial.

Mr. Gerhardt: Ready.

Mr. Taylor: Ready.

Mr. Gerhardt: If your Honor please, before the defendant proceeds with its case, there are two matters which I would like to comment upon. First, your Honor, we have had discussions with opposing counsel with respect to the attorneys fees that were demanded in this case, and based upon the fact that, although there was notice of the settlement, according to our proof, there was no original demand to come in and defend the case by APL against Marine Terminals, and pursuant to what are probably analogous cases, although not of particular point in this case, we have decided to withdraw the request for attorneys fees, which will be agreeable with the defendants, your Honor.

Mr. Taylor: That is right.

The Court: I am not quite sure that I might not protest.

Mr. Gerhardt: There is one further issue, your Honor, which has arisen because of our continued consideration of the argument made by Mr. Nave at the close of the Court's session on Friday and our further consideration of the [263] trial brief which they filed on Wednesday, when this matter first came on for trial, and that is the issue pertaining to the contention in Paragraph two of this trial brief, Page 1, line 27, and I quote: "Our liability (meaning the defendant Marine Terminals' liability), if any, to respond in indemnity, must be predicated on proof by American President Lines of sole active negligence on our part and mere passive negligence on their part."

Now, your Honor, if there is passive negligence on the part of one party, the negligence on the part of the other party could hardly be sole, that is, the only negligence, but it is defined as sole in cases, in the sense of being the proximate cause of the accident. The words, "in the cases", "sole or primary" speaking of the other party's negligence, are used in the cited cases even though there is negligence of some kind, but primarily passive negligence on the part of the original party. Those words, "sole, primary, direct and proximate" are used in that same sense in our amended complaint, your Honor. If your Honor will refer to our amended complaint on Page 4, line 2, we allege that the sole, active, primary and proximate cause

of the injury sustained by Robert Williams was the negligence of the defendant, Marine Terminals. We are using those words, your Honor, in the same sense that was used by the Court in the *Berti vs. Compagnie* case cited in the briefs on file here, which is [264] used in the same sense by the Ninth Circuit in the *Arrow Stevedoring* case, where there was negligence on the part of the shipowner, and yet the Court used the words "sole, direct or primary" as defining the negligence on the part of the other party. In order, your Honor, that there may be no question as to the fact that we are using those words in that sense, that is, in the alternative, we would ask your Honor for permission to interline the word "or" on line 2 of Page 4 of our amended complaint after "sole" and after "active", so that it will read, "Within the issues of this case as they have been tried, the sole or active or primary and proximate cause of the injuries." In that sense, your Honor, that is the very sense in which they are defined in the cases, in the alternative, and I suggest in order that there may be no question, that the Court interline the word "or" after the word "sole" and after the word "active" on line 2, Page 4.

The Court: Any objection?

Mr. Nave: Yes, your Honor, very briefly. We do object to the amendment at the close of the plaintiff's case. I wish to call your Honor's attention again to our trial brief, which we filed, in which we set forth our position from a legal standpoint. We take the position, your Honor will recall, in

the third paragraph of our trial brief, that where a defective appliance or structure or piece of equipment is [265] supplied by the shipowner, and then the injury is in reference to that equipment, that there isn't any indemnity over. The evidence in this case clearly shows that the beams had a locking device entirely supplied by the plaintiff. This is not the case where an appliance was supplied under contract by the stevedoring company. We feel that the addition of the "or" is a complete changing of the course of action. Your Honor will recall that the memorandum decision or opinion filed by Judge Carter at the time of our motion to dismiss was heard on the pleadings dealt with this matter of the sole, active and primary negligence in this case. We feel, therefore, that there is a change attempted here in the theory of the plaintiff's case, and we object to it. I would like to direct your attention to some language in the *Rothschild* case: "Here it was clearly foreseeable that if the stevedoring company made the ship unseaworthy, causing injury to a stevedore employee, the owner would be liable to the employee for the full amount of his injury under the case of *Seas Shipping Company v. Sieracki*."

We do not have that situation here where the stevedoring company has made this ship unseaworthy. The unseaworthiness, if there is unseaworthiness in this case, and we do not concede that, although counsel has as part of his burden [266] of proof the burden to show unseaworthiness, the unseaworthiness if any, was not occasioned by the

locking device, and so forth, that was supplied by the stevedoring company, but it was something supplied entirely by the ship, and in the absence of an express contract of indemnity, which is not in this case, none of these decisions, your Honor, permit a recovery for indemnity over; and we therefore object to the amendment in which they are attempting to change their cause of action.

The Court: Is the matter submitted?

Mr. Gerhardt: If your Honor please, may I also call attention to the liberality of the Federal Rules in amending pleadings even after judgment in many cases, and I feel the effect in this case of proving sole, direct and primary would be to prove our case three times. I do not think anyone would contend that, and it is perfectly obvious that this is a request which is being made to clarify the pleadings within the issues already defined.

The Court: It may be granted. (To the Clerk) Will you insert those words.

The Court: Is that your case?

Mr. Gerhardt: Yes, your Honor.

Mr. Taylor: May it please the Court and counsel, the defendant's evidence in this case will show that it was the duty of the ship to provide safe equipment. It was also [267] the duty of the ship, the plaintiff in this case, to provide a safe working place for the stevedores and all stevedore operations. The evidence will show that the strong backs or hatch beams or king beams, as they are sometimes called, are an integral part of the ship. They are also a part of the equipment that is being fur-

ished for the loading of cargo on top of certain hatch boards. The evidence will show that the duty of maintenance of the strong backs or hatch beams, the duty of the repair of the strong backs or hatch beams is exclusively with the ship and not with the stevedoring company.

The evidence will show that the President Polk had furnished a strong back without a lock. The evidence will also show that the unlocked strong back can, with slight effort, be raised and lifted from the supporting cleat or slot, and the evidence will further show that the President Polk did not furnish a substitute for the locking device that was missing.

The evidence will further show that one of the ship's officers knew of that when the ship docked in San Francisco on January 29, 1952, it had certain strong backs that did not have locks. The locks were missing. We will call as our first witness Mr. Andersen, please.

ARTHUR M. ANDERSEN

was called as a witness, and, being first duly sworn, testified as follows: [268]

The Clerk: Q. What is your name?

A. Arthur M. Andersen.

Direct Examination

By Mr. Taylor: Q. Where do you reside?

A. 3516 Morcom Avenue, Oakland.

Q. Your business or occupation?

A. Superintendent.

Q. Superintendent of what?

(Testimony of Arthur M. Andersen.)

A. Marine Terminals, stevedore.

Q. How long have you been so engaged?

A. I have been superintendent for about seven years.

Q. Prior to that time?

A. Well, I was a walking boss then.

Q. On the front? A. Yes.

Q. How long have you followed the occupation of being a longshoreman?

A. Since 1932.

Q. In what ports have you followed this occupation? A. San Francisco only.

Q. As of the month of January, 1952, who was your employer?

A. Marine Terminals Corporation.

Q. You were at that time designated as a walking boss? A. No, I was superintendent.

Q. Are you familiar with the Pacific Coast Marine Safety Code? [269] A. Yes, I am.

Q. Are you familiar with the rule that the ship is to provide safe gear in stevedoring operations?

A. Yes, I am.

Q. And the rule that the ship is to provide a safe place——

Mr. Gerhardt: If your Honor please, I should like to have that rule identified. Otherwise, I will object to the question.

Mr. Taylor: I show you Plaintiff's Exhibit 18 and call your attention to Rule 201.

Q. Are you familiar with that rule?

A. Oh yes, I am.

Testimony of Arthur M. Andersen.)

Mr. Taylor: For the record, your Honor, I will read 201: "The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship."

Q. Were you on the President Polk on the day Mr. Williams was hurt? A. I was.

Q. Were you on the Polk at the moment of his injury? A. I was not.

Q. Do you know how long after the injury it was that you arrived at the scene?

A. I couldn't tell you the time, exactly. It was after the injured man was taken away to the hospital. [270]

Q. Was the strong back that was involved in this accident pointed out to you? A. Yes.

Q. Did you observe it? A. Yes.

Q. It has been called a strong back, a king beam or a hatch beam. Are all those terms used synonymously? A. Yes.

Q. What was your observation with reference to the locking device?

A. Well, it was a lock and the nut on one end was entirely missing. In other words, the whole locking device was missing at one end.

Q. There was merely a hole in the beam where a bolt normally goes through, is that correct?

A. Yes.

Q. Who furnishes the strong back, the ship or the stevedoring company? A. The ship.

(Testimony of Arthur M. Andersen.)

Q. Who maintains the strong back? The ship or the stevedoring company?

A. The ship takes care of that.

Q. When locks are missing, who replaces them, the ship or the stevedoring company?

A. The ship. [271]

Q. What is the purpose of the lock?

A. So the strong back can not be forced out in any of the operations.

Q. It is to make it secure in the slots?

A. It is to make it safe as far as working in the hatch.

Q. Insofar as the locks on the President Polk are concerned, are they on the same side of the strong back, or are they on opposite sides of the strong back?

A. They are on the same side.

Q. Did you make any observation as to the condition of the lock at the other end? You have already described one end now.

A. No, I did not.

Q. On the President Polk on the day of the accident, January 30, 1952, was there any substitute locking device provided by the ship to hold the strong back in the slot? A. No.

Mr. Taylor: Those are all the questions I have.

Cross Examination

Q. (By Mr. Gerhardt): Mr. Andersen, you are familiar with Safety Rule 205, providing for the safety duties of the supervisory personnel. I am

(Testimony of Arthur M. Andersen.)

reading (a): "To see that all working conditions are safe and that gear is in apparent safe working condition during operation." Are you familiar with that rule? A. Yes, I am. [272]

Q. Are you also familiar with (d): "Where conditions warrant and he is not in immediate touch with his superintendent or other employer's representative, to stop the work, if necessary, to avoid accidents." Are you familiar with that one?

A. That is right.

Q. Mr. Andersen, whose duty is it to remove the beam during longshore work aboard the vessel?

A. Just what do you mean by whose duty it was?

Q. You were asked about duties here so far as maintenance of the beam is concerned. Isn't it provided that the longshoremen remove and replace beams?

A. That is right.

Mr. Gerhardt: That is all.

Redirect Examination

Q. (By Mr. Taylor): Mr. Andersen, when the statement is made to remove and replace beams, does the longshoreman ever substitute one beam for another in replacement?

A. Yes, on occasion, yes.

Q. You mean substitute one strong back, that is, you get it from your own stores and put it on the ship?

A. Oh no, no.

Q. Have you in your experience ever replaced

(Testimony of Arthur M. Andersen.)

a strong back to the extent that you have substituted one strong back for another? [273] A. No.

Mr. Taylor: That is all.

Recross Examination

Q. (By Mr. Gerhardt): Mr. Andersen, you can obtain another strong back or beam right from those that are on the ship, from other portions of the hatch, can you not?

A. You can, but it may not fit.

Q. It may not, but you know pretty well before you try it, don't you? A. No.

Q. You do not know it before you try?

A. Yes.

Q. If conditions are such that there is no reason for the beam to be in at all, it can easily be removed to the deck, isn't that so?

A. If it is not what?

Q. If it is not needed in place. A. Yes.

Q. It can easily be removed up on deck, isn't that so? A. It can be put up on deck, yes.

Mr. Gerhardt: That is all.

Mr. Taylor: That is all. We will call Mr. Bleile, if the Court please.

ERNEST BLEILE

was called as a witness on behalf of the defendant, and being [274] first duly sworn, testified as follows:

The Clerk: Your full name, please?

A. Ernest Bleile.

(Testimony of Ernest Bleile.)

Q. Where do you live?

A. 1838 Valota Road, Redwood City.

Q. Your business or occupation?

A. Stevedore.

Q. How long have you been so engaged?

A. 34 years.

Q. On this coast. A. San Francisco.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Taylor): Prior to being a stevedore, did you ship at sea? A. I did.

Q. For how long?

A. Since I was 13 years old.

Q. By whom are you employed at the present time, Mr. Bleile?

A. At the present time, Mutual Stevedoring Company, San Francisco.

Q. As of January 29th and 30th, 1952, by whom were you employed?

A. Marine Terminal Stevedoring Company.

Q. What was your business with Marine Terminals?

A. Walking boss, or supervisor on ships. [275]

Q. As supervisor generally what was your duty?

A. Supervise and direct loading and unloading of ships.

Q. Did you have safety duties as well?

A. Oh, yes.

Q. Are you familiar with the Pacific Coast Safety Rules? A. Yes, I am.

(Testimony of Ernest Bleile.)

Q. Calling your attention to Rule 201, are you familiar with that?

A. I believe I am. (A document was handed to the witness.)

The Witness: Yes.

Mr. Taylor: Q. Were you on board the President Polk on the day Mr. Williams was injured?

A. I was.

Q. Were you on board the President Polk the day before Mr. Williams was injured?

A. Yes.

Q. Do you recall about what time you went aboard the President Polk on January 29, 1952? That is, the day before Mr. Williams was injured?

A. I went aboard between 12:00 and 1:00.

Q. That is around noon?

A. Yes, around noon time.

Q. Do you know Officer Hogan? A. I do.

Q. How long have you known him? [276]

A. Prior to that about two years, maybe three.

Q. What was his position on the ship?

A. Chief Officer.

Q. Did you see Officer Hogan on January 29th, 1952? A. I did.

Q. About how long after you went aboard was it that you saw him?

A. Generally, the first thing I do, I look up the First Mate, the Chief Mate. I speak to him.

Q. Did you have a conversation with Officer Hogan about work on the President Polk?

A. I did.

(Testimony of Ernest Bleile.)

Q. Did he say anything to you about the strong backs or hatch beams on the President Polk at that time?

A. He did. I had a conversation, during the conversation he mentioned to me that he would like me to remove all excess beams, what I didn't use for handling cargo, because he had some beams on the ship which had faulty locking devices.

Q. Just what did he say to you, using his exact words, with reference to the condition of these beams, as best you recall?

A. He called me below. He said, "Will you keep your eyes open? I believe I have strong backs here which have no locks." In other words—— [277]

Q. After he told you that, what did you do?

A. I instructed both gangs in this particular hatch—we were standing by Number 1 hatch, by the way—and I instructed both gangs to stop work when and remove what excess beams he had up until then, which was done, and then we proceeded to work again.

Q. Do you know how many beams you removed or had removed on the day before the accident and how far down did you go?

A. I removed all top main battens. They are big steel beams. The next deck down, the upper between deck, I removed all but one, which is far removed from operations, and which is safety locked, and that is all I removed that day.

Q. Was the gang in Number 1 hatch loading or unloading on the 29th?

(Testimony of Ernest Bleile.)

A. That was the first day?

Q. Yes. A. Unloading.

Q. They were unloading from what deck?

A. Both gangs were unloading from the lower 'tween.

Q. That is the lower 'tween deck. Did you observe the accident to Mr. Williams?

A. No, I wasn't aware of any. I was in the stern of the ship, Number 5 hatch.

Q. Did someone notify you and did you go to the scene? [278]

A. They notified me and I came up forward.

Q. Was Mr. Williams still there, or had he been removed?

A. He was still down in the hatch.

Q. Did you at any time following the injury to Mr. Williams observe the king beam that was involved in the accident?

A. I instructed that it be hoisted on deck.

Q. Did you observe it?

A. I looked at it and it had one lock missing.

Q. Did you observe what was the condition of the other end? A. It was okay.

Q. When you said one lock was missing, can you tell the Court just exactly what you mean by that?

A. The bolt and also the pin, what constitutes the lock, the bolt and pin both were missing.

Q. Do you recall an incident on the President Polk regarding some removal of drums on the lower 'tween deck? A. I do.

(Testimony of Ernest Bleile.)

Q. Was that before or after Mr. Williams was injured? A. Before.

Q. Was it the same day or was it the day before, do you recall?

A. The same day of the accident.

Q. In the morning prior to the accident, is that right?

A. That is right. That is correct. [279]

Q. Who complained to you of the drums that were later removed? A. The gang steward.

Q. Do you remember his name?

A. No, I do not. I don't remember his name.

Q. What did he tell you was wrong? What did he complain of?

A. They called my attention to drums being stowed in the lower 'tween deck, which, in his opinion were not safe to work around. I then got lashing ropes and instructed the stevedores to lash the drums, tie them, so they wouldn't fall down. Well, it was agreeable first, but then after some more discussion, the steward—they thought they should be taken out altogether, so I instructed them to take them out to the pier.

Q. How long did it take, approximately, that operation?

A. I would say 45 minutes, possibly an hour.

Q. At or during the time of the complaint of the drums that was made to you by the steward, did the gang steward advise you of any strong back or king beam that didn't have a lock? A. No.

Q. Did the gang boss at the time that you were

(Testimony of Ernest Bleile.)

doing this removing of drums or any time prior to advise you that there was a strong back or king beam without a lock? A. No. [280]

Q. Did anyone tell you other than what you have related about Mr. Hogan, did anyone tell you about any other lock being missing?

A. No, nobody did.

Mr. Taylor: No further questions.

Cross Examination

Q. (By Mr. Gerhardt): Mr. Bleile, do you know how many beams were removed the day before the accident, as a safety measure?

A. Removed all steel pontoons on upper deck, all beams on upper 'tween deck leading to the lower 'tween, all but one.

Q. The beams that you were requested to remove without locks, that was as a safety measure, is that right? A. That is correct.

Q. If the men working in the gang under your supervision find an unsafe condition—let us say a beam that can't be latched—do they have to get in touch with you in order to have authority to remove it? A. No, sir.

Q. Do you tell them that they can go ahead and remove it?

A. That is the practice. If the gang steward sees any unsafe condition, it is in fact his business to see that it is taken off, if he does see it.

Q. Did you give instructions to your gang stew-

(Testimony of Ernest Bleile.)

ard that if he found any unsafe beams he was to remove them?

A. I gave that instruction the day before. [281]

Q. Did you give those instructions to your gang steward on the next day? A. No, I did not.

Q. You did not. Did you give any instructions to your gang boss to stop work and remove beams that were found to be unsafe?

A. The first day.

Q. The first day only and not to your gangs the second day? A. No, not the second.

Q. If the gang finds, either through the gang boss or the gang steward, finds that there is an unsafe condition or an unsafe beam, as I understand you, they have direct authority from you to stop work until that unsafe condition is corrected, is that right? A. Yes.

Q. As between the gang steward and the gang boss, which one has the responsibility to remove or correct an unsafe condition that he finds?

A. The gang steward will call such a thing to the attention of the gang boss.

Q. The gang boss? A. That is right.

Q. And without contacting you, he can go ahead and do anything that he finds is necessary?

A. If it is against the safety rules, that is correct. [282]

Q. You are familiar, are you, Mr. Bleile, with Safety Rule Number 826 that provides no cargo shall be worked through a section of the hatch un-

(Testimony of Ernest Bleile.)

less the strong back of the adjacent section is bolted, locked or secured by other means?

A. That is right.

Q. You are familiar with that rule, aren't you? That is all.

Mr. Taylor: That is all, Mr. Bleile, thank you. Your Honor, our next witness was Mr. John Black, the attorney, and we had anticipated he would be here at 10:30, but there may have been a delay of some sort. Could we have a short recess? I am sure he is on his way.

The Court: Very well. We will take a recess.

(Recess.)

JOHN H. BLACK

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Please state your name for the record. A. John H. Black.

Q. What is your profession, Mr. Black?

A. Attorney at Law.

Q. Where do you maintain your offices?

A. 233 Sansome Street.

Q. As of the month of January, 1952, who was the compensation [283] carrier for Marine Terminals?

A. Fireman's Fund Insurance Company.

Q. Were you attorney for Fireman's Fund?

(Testimony of John H. Black.)

A. Yes, sir. May I *see* in some particulars, including that.

Q. Were you attorney for Marine Terminals?

A. No, sir.

Q. Did the Fireman's Fund pay compensation to Robert Williams because of an accident and injuries received on the SS President Polk during the month of January, 1952?

A. Yes, sir.

Q. Did the Fireman's Fund pay medical expenses and hospital expenses pertaining to Robert Williams' injury?

A. Yes, sir.

Q. Did Fireman's Fund have a compensation lien for the sums expended?

A. Well, they had a right to recover them.

Q. Did you discuss the Williams case with Mr. Charles Haid, Jr., attorney for the American President Lines?

A. Yes, sir.

Q. When did you first discuss that Robert Williams case with Mr. Haid?

A. December, 1953.

Q. That was December, 1953?

A. Yes, sir. [284]

Q. How do you establish that time, Mr. Black?

A. I have this recollection of the matter, that he called me concerning the case, advising me that they had made a settlement with Mr. Williams. I was taken very much by surprise, and not wanting to exhibit any particular curiosity, I ascertained who the attorneys for Mr. Williams were, and I communicated with them and asked them the details of the settlement and the nature of the action

(Testimony of John H. Black.)

against the American President Lines; and they sent me a copy of the complaint and a copy of the release that Mr. Williams had signed.

Q. Who sent that to you?

A. I think it was Mr. Sibbett of Mr. Gladstein's office. May I correct that? It was a gentleman in my office whom I sent to get it for me, Mr. Schal-dach.

Q. What was the date that you received the copy of the summons, the complaint and the release?

A. December, 1953.

Q. That was after the release had been executed, is that correct?

A. That was some eleven and a half months or eleven months after the release had been executed.

Q. Did the Fireman's Fund ever file a lien for the compensation and medical? A. No, sir.

Q. And why not? [285]

A. The only thing I can say in that regard is we were asleep at the switch. It simply wasn't followed up the way it should have been in my office. We didn't even know the matter had been terminated or had been settled.

Q. After the settlement was made it was too late for you to establish your lien, is that right?

A. That is correct.

Q. Did Charles M. Haid ever discuss your contributing to the settlement of the Williams case?

A. He asked us to.

Q. When was that discussion?

(Testimony of John H. Black.)

A. That went on, sir, from December 1953 until the late spring of 1954.

Q. That was after the settlement had been made?

A. That was a year and a half or a year and a quarter afterwards, yes.

Q. It is your testimony that no discussion of the Williams case was held with Mr. Haid prior to the time that settlement was made?

A. None that I have any recollection of.

Mr. Taylor: Thank you, Mr. Black.

Cross Examination

Mr. Gerhardt: Q. Mr. Black, was the compensation which Fireman's Fund Insurance Co. or Fireman's Fund Indemnity Co.—

A. Fireman's Fund Insurance Co. The Indemnity Insurance is [286] onshore, and the Fireman's Fund offshore.

Q. They had received a notice of election of Mr. Robert Williams to sue APL, is that correct?

A. That is correct.

Q. When those notices of election are filed, do you follow the cases after that, that is, the third party cases to see if they are settled?

A. We are supposed to. We do not always.

Q. You did not follow it in this particular case?

A. We did not. That is why we did not collect our lien.

(Testimony of John H. Black.)

Q. Otherwise you would have tried to collect?

A. Yes.

Q. Your lien from American President Lines?

A. Either that or the bills we had expended, which I think in this case were about \$2500.

Q. Did you keep any notes of your conversations with Mr. Haid?

A. No, but I do have the letter from Gladstein's office forwarding me the complaint and the release, which was in December 1953.

Q. That was after a discussion had taken place?

A. Yes, about two days afterwards. That is the first thing I did after talking to Mr. Haid.

Q. That is your best recollection now?

A. That is my best recollection, and thereafter I had an [287] investigation made of the facts.

Q. You received medical reports from Dr. Yoell as to the progress of Mr. Williams, is that correct?

A. No, it is not correct. We did up to a point, up to April 1952, when compensation was terminated, because the suit was filed. We thereupon informed the doctor that we were no longer responsible for their charges and had no further interest in the matter.

Q. Even though you were not attorney for Mr. Robert Williams, in January of 1952 you did purport to represent them during the time of these discussions between American President Lines' representatives and Marine Terminals as to the question of indemnity or contribution, is that correct?

(Testimony of John H. Black.)

A. I wouldn't say I purported to represent them.

Q. You did represent them?

A. No, I wouldn't say that. These compensation policies, as you know, take over the employers' liability for compensation. It is not infrequent that attorneys for firms communicate directly with the insurance company rather than the employer, who simply turns it over to the insurance company in the last analysis.

Q. That compensation policy also takes over problems other than just workmen's compensation, isn't that correct?

A. Employers' liability.

Mr. Gerhardt: That is all. [288]

Mr. Taylor: No further questions. Thank you, Mr. Black.

The defendant Marine Terminals rests, Your Honor.

Mr. Gerhardt: The plaintiff rests, Your Honor. No rebuttal.

Mr. Nave: At this time, may it please Your Honor, we again renew our motion for dismissal of the action against the defendant and ask for judgment for the defendant, now that the entire case has been concluded.

(Thereupon after argument on the motion the matter was submitted on briefs.) [289]

[Endorsed]: Filed October 3, 1955.

furnish the longshoreman a seaworthy ship and from defendant stevedore's active negligence.

2. The Court erred in finding that the injury sustained by the longshoreman was incurred because of fault or negligence on the part of plaintiff shipowner.

3. The Court erred in not finding that the defendant stevedore's negligence was the sole, active or primary cause of the injury to the longshoreman.

4. The Court erred in failing to find that even if the plaintiff was negligent, that the injury to the longshoreman was caused by an independent act of negligence on the part of defendant which supervened in time and became the sole, active, primary or proximate cause of the injury.

5. The Court erred in that the evidence was insufficient to support finding of fact No. 8 and erred in failing to find that the winch driver was negligent contrary to finding No. 8.

6. The Court erred in failing to find that defendant stevedore company and its employees were fully aware of the dangerous condition created by the missing locking device on No. 2 strongback and failed to take proper precautions to suspend operations until the unsafe condition was corrected or to take any measures to insure that the dangerous condition was corrected by removing the defective beam and that defendant was grossly negligent and reckless in its failure to do so.

7. The Court erred in failing to find the walking boss, gang boss, gang steward and winchman employed by defendant continued with cargo opera-

tions in the face of a known dangerous condition in direct violation of the Pacific Coast Maritime safety code adopted to cover working conditions of this gang aboard the vessel, which code was known to the winch driver, gang boss and walking boss.

8. The Court erred in failing to find that under the stevedoring contract under which defendant performed stevedoring services on plaintiff shipowner's vessels defendant had the obligation to the plaintiff to remove hatch beams and to refrain from negligent acts or omissions which would impose liability upon the plaintiff.

9. The Court erred in adopting conclusions of law inconsistent with the finding of fact.

10. The Court erred in that conclusion of law No. 4 is inconsistent with finding of fact No. 12.

11. The Court erred in that the findings of fact are insufficient to support conclusion of law No. 4.

12. The Court erred in that conclusions of law Nos. 1, 2, 4, 5, 6 and 7 are inconsistent with finding of fact No. 12 and not supported by the evidence or any finding of fact.

13. The Court erred in that the findings of fact are insufficient to support conclusions of law Nos. 1 and 2 that plaintiff and defendant were jointly and concurrently negligent and said conclusions were contrary to the findings of fact.

14. The Court erred in that there is no evidence or finding to support conclusion of law No. 2, that the shipowner knowingly supplied or knew that a particular hatch beam lacked a locking device.

15. The Court erred in conclusion of law No. 5

applying the law of American Mutual Liability Insurance Co. vs. Mathews, 182 Fed. 2d 332, and Caleyon Lines vs. Haenn Ship Refitting Company, 42 U. S. 382 to the facts of this case and contrary to its finding of fact No. 12.

16. The Court erred in holding that the plaintiff's right to indemnity against defendant in the absence of an express contractual indemnity provision is allowable only in the event the former fails to perform its non-delegable duty to furnish seaworthy ship.

17. The Court erred in holding that the plaintiff's right to indemnity against the defendantavedore company in the absence of an express contractual indemnity provision is not allowable where plaintiff's negligence was inactive or passive and defendant's negligence was the active or primary cause.

18. The Court erred in awarding final judgment in favor of defendant Marine Terminals Corporation and against plaintiff American President Lines, Ltd.

Dated: December 2, 1955.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,

/s/ EDWIN L. GERHARDT,

/s/ GORDON L. POOLE,

Counsel for Appellant

[Endorsed]: Filed Dec. 2, 1955. Paul P. O'Brien,
clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBITS

It Is Hereby Stipulated that the exhibits received in evidence at the trial of this cause need not be printed or otherwise reproduced but shall be considered in their original form and may be referred to by the exhibit designations allocated thereto at the trial.

Dated: December 2, 1955.

/s/ LILLICK, GEARY, OLSON, ADAMS
& CHARLES,

Counsel for Appellant American
President Lines, Ltd.

BOYD & TAYLOR,

/s/ By M. K. TAYLOR,

Counsel for Appellee Marine
Terminals Corporation

[Endorsed]: Filed Dec. 2, 1955. Paul P. O'Brien,
Clerk.

No. 14,959

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellant,

vs.

MARINE TERMINALS CORP., a corporation,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the
Northern District of California, Southern Division

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PAUL P. O'BRIEN, CLERK

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In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellant,

vs.

MARINE TERMINALS CORP., a corporation,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the
Northern District of California, Southern Division

Jurisdictional Statement

This is an appeal from a judgment entered by the United States District Court for the Northern District of California, Southern Division, in favor of appellee Marine Terminals, Inc.

The complaint filed in the court below was for indemnity sought by appellant, American President Lines, Ltd., a Delaware corporation, against appellee, a Nevada corporation, in the amount of \$62,500, representing the amount for which appellant became liable to and paid Robert B. Williams, an employee of appellee.

After trial Judgment was entered August 2, 1955 (Tr. 37).

Notice of appeal was filed August 30, 1955 (Tr. 38).

Cost Bond on Appeal was filed August 30, 1955 (Tr. 38-39).

Stipulation and Order Extending Time to File Record and Docket Appeal was filed October 7, 1955 (Tr. 40).

Designation of Contents of Record on Appeal was filed November 16, 1955 (Tr. 40-41).

Statement of Points on Appeal was filed December 2, 1955 (Tr. 300-303).

The District Court had jurisdiction pursuant to 28 USCA Sec. 1332 the action being based upon diversity of citizenship and the amount in controversy, exclusive of interest and costs, exceeding \$3,000.

The Court of Appeals has jurisdiction to entertain this appeal pursuant to the provisions of 28 USCA Sec. 1291.

Statement of the Case and Facts

This is an action by American President Lines, Ltd., owner of the *SS President Polk*, appellant, against Marine Terminals Corporation, a stevedore company, appellee, for indemnity in the amount of \$62,500.00 which was paid in settlement to Robert B. Williams, a longshoreman employed by appellee Marine Terminals Corporation, for injuries he sustained January 30, 1952, in the course of his duties aboard appellant's vessel, the *SS President Polk*.

Prior to the injury, appellant, steamship corporation, and appellee, stevedoring contractor, entered into a written contract (Exh. 16) for stevedoring services to be performed aboard appellant's vessels. Under this contract, the stevedoring company was engaged to perform loading and unloading operations aboard appellant's vessels in San Francisco Harbor and to remove beams and hatch covers. With

this contract appellee agreed to provide necessary stevedoring labor and supervision for the proper and efficient conduct of the work. Pursuant to this written contract, appellee stevedoring corporation was engaged in the performance of loading and discharging operations aboard the *SS President Polk* January 29 and 30, 1952.

When stevedoring operations aboard the *SS President Polk* commenced January 29, 1952, Gang No. 116, employed by appellee, boarded the vessel to discharge cargo from No. 1 hatch. The following day, on January 30, at approximately 9:30 or 10:00 A.M., Williams, as a member of Gang No. 116, was struck and severely injured by a falling hatch beam, which was dislodged by the bridle used to load drums into the hold.

Ernest Bleile, the walking boss for the defendant, Marine Terminals Corporation, was aboard the vessel on January 29, 1952, at which time the chief officer told him to keep his eyes open because he *believed* there were some beams aboard with no locks and that such beams should be removed to the deck (Tr. 289). Bleile then instructed the gangs at work to remove excess beams from No. 1 hatch and to place them on the deck. He also issued instructions to remove all unsafe beams (Tr. 289). Work continued that afternoon in the lower tween deck but the next morning, January 30, conditions were changed in the No. 1 hold when Gang No. 116 came aboard to uncover No. 1 lower hold and to load cargo into the lower hold beneath the beam in question (Tr. 113, 114, 129). The instructions were not repeated by Bleile, on this latter day, however (Tr. 293).

Gang No. 116, including Williams, commenced loading operations in the lower hold at 8:00 o'clock a.m. January 30 beneath this defective beam (Tr. 81, 112). The hatch square above the lower hold contains three sections of

hatch boards running fore and aft. The forward section between the forward edge of the hatchcoaming and No. 2 beam was removed by the longshoremen for the first time on the morning of January 30 to permit access to the lower hold (Tr. 57, 72, 113-115, 139, Exh. 2). No. 2 beam was partially exposed, revealing the missing locking device (Tr. 115, 116). The remaining sections of hatch boards were left in place. No cargo was placed on the remaining two sections of the hatch square, and these hatch boards and the beams upon which they rested, could have been removed had the longshoremen chosen to do so (Tr. 133, 173). None of appellant's personnel were shown to be in the area of No. 1 hold on the morning of January 30 prior to the accident (Tr. 81, 82, 166, 167, 189).

Gang steward, Edward Randolph, the man in the lower hold with Gang No. 116 primarily charged with the responsibility for safety (Tr. 111, 147, 292), noticed shortly after work began on January 30, that the port lock or safety latch was missing on No. 2 strongback in the lower 'tween deck (Tr. 115-116). He was concerned about this condition, which he admitted was an unsafe one, in view of the fact that loading operations were being conducted beneath this beam (Tr. 117-118). Edward Randolph, upon discovery of this condition, reported it to his gang boss, Rueben Swanson, and to his walking boss, Ernest Bleile (Tr. 117-121, 135). Swanson confirmed he was told by Edward Randolph that the locking device was missing on the port side of the hatch beam (Tr. 178-179) and that he recognized it constituted an unsafe condition, but he did nothing about it (Tr. 178). Instead, work continued in the face of the knowledge of this unsafe condition until the accident occurred (Tr. 180-181).

Romeo Paquette, a longshoreman with 33 years experience, was the winchman at the time of the accident, and

alternated with his partner Kellberg, the jobs of winchman and hatchtender stationed at the side of the vessel next to the pier (Tr. 153-154, 170). Paquette testified that, in his experience, the use of only one open section in a hatch square presented too small an opening for the working of cargo (Tr. 156). It was invariably his rule to protest small openings afforded by one section to the walking boss and to ask that another section be removed to permit a larger opening (Tr. 157). With the vessel down by the stern, the riddle, in its movements up and down through the hatch opening, swung toward the after end of the hatch so that it would strike against the partially exposed unlocked No. 2 beam (Tr. 155, 156, 158).

Appellee's employees aboard the vessel were working in accordance with the rules set forth in the Pacific Coast Maritime Safety Code. (Exh. 18) This Code provided, in part, as follows:

"Rule 202. The employer shall provide, so far as the same shall be under his control, a safe working place for all operations.

"Rule 204. The employer shall require the use of safe processes and practices.

"Rule 205. The safety duties of the supervisory personnel, walking boss, ship and dock foremen, and assistant ship and dock foremen are:

(a) To see that all working conditions are safe and that the gear is in apparent safe working condition during the operation.

(c) To see that operations are carried on in a safe manner.

(d) Where conditions warrant and he is not in immediate touch with his superintendent or other employer's representative, to stop the work if necessary to avoid accidents.

"Rule 206. The safety duties of the hatch, dock, gang, or other group leader are:

(a) To be in direct charge of his gang or group and to see that all work is done in a safe manner.

(b) To report promptly to his foreman or walking boss or other employer representative on the job any defect in the gear or machinery or any unsafe working condition.

(d) In the event that he finds it impossible to get in touch immediately with his foreman or walking boss or other employer representative on the job, to himself stop the work upon discovery of any defective gear until his foreman or walking boss or other employer representative on the job shall have had an opportunity to pass upon the situation.

"Rule 207. The safety duties of the person designated as hatch tender or signal man are:

(a) To consider himself as the safety man for the gang, and for this purpose to cooperate with his foreman or walking boss or other employer representative on the job for the safety of the men during operations.

(e) To see that strongbacks adjacent to sections through which cargo is to be worked are locked, bolted, or otherwise secured before hoisting operations are started.

"Rule 824. The foreman or walking boss or hatch tender in charge of the hatch shall personally supervise the removal or replacement of hatch covers, strongbacks or beams.

"Rule 826. No cargo shall be worked through a section of a hatch unless the strongback of the adjacent section is bolted, locked or secured by other means."

These rules were known to Mr. Anderson, defendant's superintendent (Tr. 282), Ernest Bleile, the walking boss (Tr. 287); and to gang boss Swanson (Tr. 182), and gang steward Edward Randolph (Tr. 125), all of whom were employed by Marine Terminals Corporation to supervise generally operations aboard the vessel (Tr. 282, 287, 181-2,

111). The foregoing rules all pertain to the appellee Marine Terminals Corporation, and their employees.

Although gang boss Swanson knew that the missing lock presented a dangerous condition for those working in the No. 1 lower hold and although he had authority to do so (Tr. 293), no action was taken by him either to suspend operations or to insure that his superiors aboard the vessel were aware of the dangerous condition (Tr. 178-179, 181). Although the gang steward Randolph could have suspended loading operations in No. 1 lower hold (Tr. 293) the work continued under the defective beam (Tr. 131).

It would have taken from ten to twenty minutes to remove the defective hatch beam and the additional section of hatch boards resting on that hatch beam so that the hazardous condition would have been eliminated (Tr. 125-126, 161). Indeed, after the accident had occurred, this additional section was removed, resulting in no interference to unloading operations which were taking place in the lower tween decks of No. 1 hold (Tr. 143-144, 161, 174-175, Exh. 10).

At the time of the accident, Williams was engaged in handling drums which were lowered into the hold by a sling provided for that purpose. After unhooking two drums he attempted to steady the bridle, but the winchdriver hoisted it too fast (Tr. 54, 83). Romeo Paquette, the winch driver, who was actuating the empty sling upward saw the hook of the bridle catch under the flange of the strongback, lifting it out of its cleat or slot, then becoming disengaged and plummeting into the lower hold (Tr. 157-158). Williams was struck by this heavy strongback, and when he was found by James Randolph, his fellow worker, he was lying partially underneath the strongback severely injured.

Williams received benefits for a time under the Longshoremen and Harbor Workers Compensation Act, and then elected to sue the shipowner under the act's provisions. Treadwell & Laughlin, the attorneys then representing appellant defended this suit, and on January 16, 1953, the case was settled by the payment of \$62,500.

No formal demand was made of appellee by appellant to defend the case brought against it by Williams, but appellee was notified by appellant's attorneys of the suit and the progress of negotiations (Tr. 245-248).

The present suit for indemnity was filed September 20, 1954, seeking recovery from appellee for \$62,500, the amount of the settlement paid to Williams by American President Lines plus attorneys' fees and costs. The shipowner subsequently waived any right to recover attorneys' fees and costs. After trial, the lower court found negligence on the part of appellant shipowner and refused to grant indemnity for the settlement amount. Judgment in favor of stevedore appellee was entered August 2, 1955.

Specifications of Error

1. The Court erred in failing to find that the stevedoring contract under which appellee performed stevedoring services on appellant shipowner's vessel obligated appellee to remove hatch beams and to refrain from negligent acts or omissions which would impose liability upon appellant.

2. The Court erred in finding that the injury sustained by the longshoreman was incurred because of negligence on the part of appellant shipowner.

3. The Court erred in that the evidence was insufficient to support finding of fact No. 8 and erred in failing to find that the winch driver was negligent contrary to finding No. 8.

4. The Court erred in failing to find that appellee stevedore company and its employees failed to take proper precautions to suspend operations until the unsafe condition was corrected or to take any measures to insure that the dangerous condition was corrected by removing the defective beam and that appellee was grossly negligent and reckless in its failure to do so.

5. The Court erred in failing to find the walking boss, gang boss, gang steward and winchman employed by appellee continued with cargo operations in the face of a known dangerous condition in direct violation of the Pacific Coast Maritime safety code.

6. The Court erred in not finding that the injury sustained by the longshoreman arose from appellant shipowner's breach of its non-delegable duty to furnish the longshoreman a seaworthy ship and from appellee stevedore's sole negligence.

7. The Court erred in failing to find that even if appellant was negligent, the injury to the longshoreman was caused by an independent act of negligence on the part of appellee which supervened in time and became the active, primary or proximate cause of the injury.

8. The Court erred in holding that appellant's right to indemnity against appellee in the absence of an express contractual indemnity provision is allowable only in the event the former fails to perform its non-delegable duty to furnish a seaworthy ship.

9. The Court erred in holding that appellant's right to indemnity against appellee stevedore in the absence of an express contractual indemnity provision is not allowable where appellant's negligence was inactive or passive and appellee's negligence was the active or primary cause.

10. The Court erred in conclusion of law No. 5 in applying the law of *American Mutual Liability Insurance Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950), and *Halcyon Lines v. Haenn Ship Refitting Corp.*, 342 U.S. 282 (1952) to the facts of this case.

11. The Court erred in that conclusion of law No. 4 conflicts with finding of fact No. 12.

12. The Court erred in that the findings of fact are insufficient to support conclusion of law No. 4.

13. The Court erred in that conclusions of law Nos. 1, 2, 4, and 5 are inconsistent with finding of fact No. 12 and are not supported by the evidence or any finding of fact.

14. The Court erred in that there is no evidence or finding to support conclusion of law No. 2, that the appellant shipowner knowingly supplied or knew that a particular hatch beam lacked a locking device.

15. The Court erred in that the findings of fact are insufficient to support conclusions of law Nos. 1 and 2 that plaintiff and defendant were jointly and concurrently negligent and said conclusions are contrary to the findings of fact.

Summary of Argument

I. Indemnity Allowed for Breach of Stevedore's Contractual Obligation to Perform Work Safely.

The Court erred in failing to find that the stevedoring contract under which appellee stevedoring corporation was engaged in stevedoring operations, obligated appellee to refrain from negligent acts or omissions amounting to a breach of its warranty of workmanlike service to perform its work in a safe and proper manner. Indemnity should be awarded appellant for the breach of appellee's contractual duty based on the recent Supreme Court case of *Ryan*

Stevedoring Co. v. Pan Atlantic S.S. Corp. (Brief Section I, Specification of Error No. 1).

I. Indemnity Also Allowed Where Vessel Unseaworthy and Stevedore Solely Negligent.

Even if the basis for appellant's recovery, stated in Section I above is not recognized, appellant American President Lines was liable to the employee longshoreman Williams solely by virtue of its absolute duty to supply a seaworthy vessel and a safe place in which to work and was without negligence. The cause of the accident was the sole negligent conduct of appellee stevedore company, and on this basis indemnity should be awarded in favor of appellant shipowner. In this connection, the trial court also failed to find, and should have found, that appellee's walking boss, gang boss, gang steward and winch driver were negligent and violated the Safety Code (Brief Section II, Specifications of Error Nos. 2, 3, 4, 5 and 6).

II. Alternatively, Negligence of Shipowner Does Not Bar Indemnity Where Stevedore's Negligence Active and Primary.

Even if appellant was guilt of some negligence, that negligence was of the passive or secondary sort. The negligence of the stevedore was the active, primary, and proximate cause of the accident which resulted in Williams' injury. Based upon recognized principles of common law, indemnity recovered should be awarded in favor of appellant shipowner (Brief Section III, Specifications of Error Nos. 7, 8 and 9).

V. Indemnity, Not Contribution, Still Permitted Under *Halcyon v. Haenn*, and *American Mutual v. Matthews*.

The principles enunciated in the cases of *Halcyon Lines v. Haenn Ship Refitting Corp.* and *American Mutual Lia-*

bility Insurance Co. v. Matthews, relied upon by the trial court in its conclusions of law do not support the conclusions reached therein, but to the contrary support recovery by appellant in its suit for indemnity. Further, *States Steamship Co. v. Rothschild International Stevedoring Co.* relied upon by the trial court does not foreclose recovery by appellant (Brief Section IV, Specification of Error No. 10).

V. Findings of Fact and Conclusions of Law Conflict, Are Unsupported by the Evidence, and Do Not Support the Judgment Below.

Conclusions of Law 1, 2, and 5, all to the effect that appellant was jointly and concurrently negligent with appellee, and that appellant knew of the particular defective beam and the progress of work thereunder, and Conclusion of Law No. 4 that appellant's concurrent negligence went well beyond a mere passive act of negligence, are unsupported by evidence or by any findings of fact. Said conclusions are further inconsistent with Findings of Fact Nos. 3, 4, and 5 and conflict with Finding No. 12 (Brief Section V, Specifications of Error Nos. 11, 12, 13, 14 and 15).

Argument

I.

INDEMNITY ALLOWED FOR BREACH OF STEVEDORE'S CONTRACTUAL OBLIGATION TO PERFORM WORK SAFELY

A. Summary of Argument.

The Court erred in failing to find that the stevedoring contract under which appellee stevedoring corporation was engaged in stevedoring operations obligated appellee to refrain from negligent act or omissions amounting to a

breach of its warranty of workmanlike service to perform its work in a safe and proper manner. Indemnity should be awarded appellant for the breach of appellee's contractual duty based on the recent Supreme Court case of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*

3. Specification of Error No. 1.

"The Court erred in failing to find that the stevedoring contract under which appellee performed stevedoring services on appellant shipowner's vessel obligated appellee to remove hatch beams and to refrain from negligent acts or omissions which would impose liability upon appellant."

It is by now well recognized that a claim based upon an express indemnification provision in a stevedoring contract running between the stevedore and the shipowner affords a proper basis for relief. However, the absence of an express indemnity clause does not indicate that such an action must fail.

The trial court below, in denying indemnity, did so without reference to the obligations of the parties under the stevedoring contract between shipowner-appellant and stevedore contractor-appellee. The trial court found, however, that such a contract was in force (Finding of Fact No. 1 (Tr. 32).

Under the terms of this contract, it was provided:

"2-b. *Provide* all necessary stevedoring labor, including winchmen, hatchtenders, tractor and fork-lift operators, foremen, and *such other stevedoring supervision as are needed for the safe and efficient conduct of the work* and for the vessel's utmost despatch.

"2-c. Adjust rigging of booms, guys and other ordinary cargo tackle at hatches where work of discharging and/or loading will be conducted as required in the operation, and readjust when completed. *Remove and replace beams, hatch covers and tarpaulins.*" (Italics ours)

The contract in force between the stevedore and the shipowner provides the basis for the claim of indemnity which is founded upon express or implied obligations arising thereunder.

The stevedore contract here under consideration provides, as is usual in situations of this character, that the stevedore contractor shall perform loading and discharging services about the vessel. This, of course, involves various incidental duties, such as removing and replacing hatch covers, hatch beams, and the like, to gain access to the cargo holds. The agreement provides expressly that such duties will be safely performed. Even in the absence of such expression in the contract it would normally be implied. *Lundberg v. Prudential Steamship Corp.*, 102 F. Supp. 115 (S.D. N.Y. 1951).

Subsequent to the entry of judgment in the present case, the Supreme Court decision in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.* was rendered (..... U.S., 100 L.ed. (Advance) page 146). This case represents somewhat of a departure from the welter of decisions, dealing with the problem of the relationships between the stevedore employer and the shipowner, where an employee of the stevedore employer is injured while working aboard shipowner's vessels. This case held that a stevedore contractor who agrees to perform the shipowner's stevedoring operations, thereby assumes the obligation, not only to do the work contracted for, but to do its work properly and safely, and this latter obligation is of the essence of a stevedore's contract. It is the warranty of workmanlike service comparable to a manufacturer's warranty of the soundness of its manufactured product. For breach of this obligation, recovery is permitted on an indemnity theory.

In the *Ryan* case, it is stated as follows, 100 L.ed. (Advance) pages 152, 153:

“The shipowner here holds petitioner’s uncontroverted agreement to perform all of the shipowner’s stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner’s obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner’s stevedoring contract. It is petitioner’s warrant of workmanlike service that is comparable to a manufacturer’s warranty of the soundness of its manufactured product. The shipowner’s action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner’s stevedoring service. * * * Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner’s failure to discover and correct the contractor’s own breach of warranty as a defense. Respondent’s failure to discover and correct petitioner’s own breach of contract cannot here excuse that breach.”

The facts of the instant case clearly show a breach of the warranty by the stevedore employer under its contract. The removal of hatch boards and beams is essential to loading and unloading cargo aboard a merchant vessel, and indeed the stevedoring contract specifically provided that the responsibility rested with the stevedore for removal and replacement of the same (Exh. 16, Sec. 2(b)). That the longshoremen employees of appellee breached their warranty of safe and workmanlike service (Exh. 16, Sec. 2(a))

is manifest from the record. We refer to the imposing chain of events which made this unfortunate accident inevitable after the stevedore, on the morning of January 30, 1952, discovered a lock was missing from #2 beam in #1 lower tween deck. The failure of walking boss Bleile to insure that defective beams were removed, the failure of the winch-driver, Paquette, to prepare a suitable opening for cargo operation in the lower tween deck for the cargo hook and bridle (Tr. 156, 157) and in lifting or raising the hook before it was steadied below (Tr. 54-55, 83, 156); the extraordinary conduct of gang steward Edward Randolph in failing to take any precautions either to remove, or to suspend operations (Tr. 292-294) in the face of a known peril actually recognized by him, the failures of walking boss Bleile and gang boss Swanson to take any action for the safety of the men committed to their charge, knowing of the dangerous condition. The actions of each represents a clear violation of the stevedore's contractual obligation. Taken collectively, the cumulative effect offers conclusive proof of a substantial breach of the stevedore's warranty. The stevedore's activities in performing under this contract resulted in an injury to Williams under circumstances which the stevedore might reasonably have suspected or known would have imposed liability upon American President Lines for the injuries so caused.

We submit that, for the foregoing reasons alone, error was committed by the court below under Specification of Error No. 1 in failing to find a breach of the stevedore's contractual warranty.

The recent *Ryan* case, we believe, effectively establishes appellant's right to recover. When the contractual relationship between the stevedore employer and the shipowner exists and a breach of the stevedore's obligations is shown,

that breach should be held to impose liability without reference to the relative responsibilities of the parties for the tort.

If however, for any reason, this court should choose to rely upon the case law as it existed prior to the decision in *Ryan*, there are equally compelling reasons obtaining here to reverse the judgment of the trial court and award indemnity to appellant. The Supreme Court, in reaching the result of the contractual theory of indemnity, did so expressly leaving open the question of common law indemnity discussed in the cases prior to its decision (100 L.ed. Advance p. 152). Thus, even aside from the *Ryan* basis of recovery the record before this court demonstrates that based on either unseaworthiness of the ship (Sec. II, Brief) or a comparison of fault and negligence as between shipowner and stevedore (Sec. III, Brief) indemnity will lie.

II.

INDEMNITY ALSO ALLOWED WHERE VESSEL UNSEAWORTHY AND STEVEDORE SOLELY NEGLIGENT

A. Summary of Argument.

Even if the basis for appellant's recovery stated in Section I above is not recognized, appellant American President Lines was liable to the employee longshoreman Williams solely by virtue of its absolute duty to supply a seaworthy vessel and a safe place in which to work and was without negligence. The cause of the accident was the sole negligent conduct of appellee stevedore company, and on this basis indemnity should be awarded in favor of appellant shipowner. In this connection, the trial court also failed to find, and should have found, that appellee's walking boss, gang boss, gang steward and winch driver were negligent and violated the Safety Code.

It is conceded that American President Lines owed to Williams a non-delegable duty to supply a seaworthy ship. That American President Lines was liable to the injured stevedore is unquestioned. The fact that the safety latch, an integral part of the beam, was missing constitutes failure on the part of appellant to supply a seaworthy vessel. Such liability is absolute and not based on any concept of negligence.

Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944);

Seas Shipping Company v. Sieracki, 328 U.S. 85 (1946);

Babnick v. The Mt. Athos, 122 F. Supp. 68 (W.D. Wash. 1954).

B. No Negligence of Shipowner.

1. SPECIFICATION OF ERROR NO. 2.

“The Court erred in finding that the injury sustained by the longshoreman was incurred because of negligence on the part of appellant shipowner.”

The conclusion that negligence is attributable to appellant American President Lines has to be based upon the following two findings: Finding of Fact No. 4, that plaintiff knew and was aware of the absence of locking devices on *some* of the strongbacks on the vessel. This finding, together with Finding of Fact No. 5, sets forth that a warning “*some* beams board the vessel might lack locking devices” was communicated by the chief officer of the vessel to walking boss Ernest Bleile. Findings No. 4 and No. 5 are based solely upon the testimony of Ernest Bleile. The testimony on this point was brief. The pertinent portions appear below (Tr. 289):

“A. (by Ernest Bleile) I had a conversation, during the conversation he (Chief Officer Hogan) mentioned to me that he would like me to remove all excess beams what I didn’t use for handling cargo, because he had some beams on the ship which had faulty locking devices.

Q. Just what did he say to you, using his exact words, with reference to the condition of these beams, as best you recall?

A. He called me below. He said, ‘Will you keep your eyes open? I believe I have strong backs here which have no locks.’ * * * .”

Findings of Fact No. 4 and No. 5 have support from the testimony only to the extent of a belief on the part of the chief officer of the vessel that he had some strongbacks aboard the vessel which lacked locking devices. Conclusion of Law No. 2 specifically determines that there was concurrent negligence on the part of the shipowner for “knowingly supplying a beam with a defective device”. But it will be noted there is no finding that plaintiff knew of the missing device on No. 2 king strongback. There was no evidence of such knowledge and no such knowledge can be imputed to the shipowner. (We will hereafter in Section V discuss the conflict between the Findings of Fact 3, 4 and 5 and the unsupported Conclusion of Law No. 2 that the shipowner knowingly supplied a beam with a defective lock.) The evidence supports only the *belief* of Hogan there were some strongbacks aboard without locks and that this belief was communicated to Ernest Bleile, walking boss of appellee, and such evidence cannot be strained to support a finding that the shipowner was aware that the particular beam in question was unsafe or that it lacked a locking device. There is no evidence that any of the shipowner’s employees were present in the vicinity of loading operations at No. 1 hold,

and appellee's employees who were at that position could not recall that any ship's officers or other employees of appellant were present during the course of loading or discharging operations (Tr. 81, 82, 166, 167, 189). There is no basis on which the court could assume that there was an awareness on the part of appellant or its employees that No. 2 strongback constituted a peril for the men working below. There is not a shred of testimony in the record to show knowledge of the shipowner or officers of the perilous condition obtaining in No. 1 lower hold while appellee continued with its work.

C. Sole Negligence of Stevedore.

1. SPECIFICATION OF ERROR NO. 3.

"The Court erred in that the evidence was insufficient to support finding of fact No. 8 and erred in failing to find that the winch driver was negligent contrary to finding No. 8."

This is in addition to other faults of stevedore appellee hereinafter outlined.

Finding of Fact No. 8 is as follows:

"8. That the winch driver, Mr. Paquette, had prior to, and at the time of the dislodgment of said hatch beam, been using operating and manipulating the bridle and hook in the usual and customary manner and free of any negligence whatsoever."

We submit this finding of fact is clearly erroneous, is not supported by, and is contrary to, the evidence. Paquette did not approve of the procedure utilized on this occasion, wherein only one section of the hatch square in the lower tween deck, No. 1 hold, was open during stevedore operations (Tr. 156-157). Paquette testified that with one hatch section open, there was not enough room for the cargo bridle

with its hook to move up and down without hitting obstructions (Tr. 156). In fact, with the ship down by the stern, as in this case, the chances that the bridle and hook would strike the No. 2 strongback were greatly increased (Tr. 158). His practice was to remove, wherever possible, more than one section of the hatch boards to facilitate loading or discharging operations (Tr. 157, 158, 159). An extra hatch section could have been removed without any detriment to stevedoring operations resulting had the stevedores chosen to do so (Tr. 133, 173-5 Exh. 10). Paquette's reasons for failing to remove an extra section of the hatch square were set forth at page 157 of the transcript as follows:

"A. (by Paquette) Normally if the thing is safe and everything—sometimes we can't take two sections off—they have cargo on top of the hatches.

Q. If it is unsafe, what do you do?

A. If it is unsafe, the boys underneath is the ones that are working. Those strong backs aren't going to hit me on top there.

Q. You leave it up to the boys underneath to request it?

A. Yes. If they say remove it, we remove it."

Thus the record indicates a recognition on the part of Paquette of the peril created by conducting discharging operations with but one hatch square section open, yet a callous disregard on his part from his position of safety of the dangers to which those below were exposed. It should be noted, too, that Paquette alternated with his partner Kellberg in acting as hatch tender at the side of the vessel. Safety Rule No. 207 specifically required the hatch tender to consider himself as safety man for his gang and "to see that strongbacks adjacent to sections through which cargo is to be worked are locked, bolted, or otherwise secured before hoisting operations are started". In addition,

Rule 824 provides: "The foreman or walking boss or hatch tender in charge of the hatch shall personally supervise the removal or replacement of hatch covers, strongbacks or beams." It appears that Paquette simply failed to concern himself with the dangers facing the men below or to observe either the rules or a standard of reasonable care with respect to safety operations in No. 1 hold.

There was strong and convincing evidence, by the above uncontroverted testimony, to demonstrate that he failed negligently to insure the safety of the men in his charge working in the lower hold who were threatened by the movement of the bridle. The evidence also shows negligence on the part of Paquette in the manipulation of the bridle. Williams' testimony was to the effect that after unhooking the two drums he tried to steady the bridle (to keep it from swinging) but was unable to do so because the bridle was hoisted out of his reach. There is no question but that the bridle should have been steadied before it was raised, but in this case it was raised too fast—because the winch driver "sat back on the levers". The following excerpts from the testimony of Paquette and Williams are enlightening.

Paquette (Tr. 156):

"Q. Was the bridle opposite Number 2 strong back?

A. What do you mean, opposite Number 2?

Q. Did you actually see it swing against Number 2 strong back?

A. It swings all the time. Every load it swings.

Q. Why does it swing?

A. Why? Because a lot of times the boys don't steady it. Sometimes the winches go a little faster, sometimes faster than others, and it gives a little swing, and when you are working in one section, a little swing one foot one way or the other, you don't have much space in there."

Williams (Tr. 54-55) :

“Q. Will you tell the Court what happened at the time you were injured?

A. I myself proceeds to unhook the two drums that had been lowered into the lower hold of the President Polk, No. 1 hatch. I attempts to steady the bridle. The winch driver sits back on the levers. He goes ahead, and before I know anything the hook that is on that cable hooked into the beam, and before I knew anything the beam had struck me.

Q. When you said the hatch driver goes ahead, you mean he raised the bridle?

A. After the bridle had been released from the two drums.”

Williams (Tr. 83) :

“Q. I believe you said this morning that the sling started to move and you attempted to steady it, is that right?

A. Yes.

Q. How did you attempt to steady the sling after the bridle had been unhooked?

A. With one hand, sometimes two.

Q. At that time were you using one hand or two hands to steady it?

A. That particular morning?

Q. Yes.

A. I can't recall whether I used two or one.

Q. In any event—

A. I attempted to check the swing.

Q. The sling was on its way up, is that right?

A. Yes.

There is not one word of testimony to support Finding of Fact No. 8 and, as shown above, the evidence is to the contrary.

2. SPECIFICATIONS OF ERROR NOS. 4 AND 5.

“The Court erred in failing to find that appellee stevedore company and its employees failed to take proper precautions to suspend operations until the unsafe condition was corrected or to take any measures to insure that the dangerous condition was corrected by removing the defective beam and that appellee was grossly negligent and reckless in its failure to do so.” (Specification of Error No. 4.)

“The Court also erred in failing to find the walking boss, gang boss, gang steward and winchman employed by appellee continued with cargo operations in the face of a known dangerous condition in direct violation of the Pacific Coast Maritime safety code.” (Specification of Error No. 5.)

Sometime prior to the accident, either on January 29 or January 30, work was suspended during cargo operations to permit the movement of drums away from a dangerous and exposed position above No. 1 lower hold (Tr. 119, 182-184, 291). These drums had been stowed in the wings of the lower tween deck and so close to the hatch coaming that they were in danger of falling into the lower hold below (Tr. 120, 132, 133). Work was suspended while these were removed to a safer location. This took 45 minutes to an hour to accomplish (Tr. 291). Had a similar suspension of work for approximately 10 to 15 minutes been taken for removal of the defective hatch beam, the unfortunate accident to Williams would not have occurred.

The negligence of the stevedore in other respects was also clear. The same factors which point up the breach of the stevedore's contractual duty to perform work in a reasonably safe prudent manner as outlined under Section I of this brief also establish the gross negligence and carelessness of appellee stevedore company.

Specifically the testimony shows violation by supervisory personnel Anderson, Bleile and Swanson of Rule 205 to see that working conditions were safe, and gear in proper order, and to stop work to avoid accidents; a violation by hatch-tenders Kellberg and Paquette of their obligations under Rule 207; a violation by Bleile and Swanson of Rule 824—and a violation by Randolph and Swanson of Rule 826.

The court below in part supports our contention by Finding of Fact No. 12, which provides that the defendant stevedore company “continued to work with the knowledge of the dangerous condition of the defective strongback” (Tr. 34).

D. Vessels Unseaworthiness and Stevedore Negligence Proper Basis for Indemnity.

1. SPECIFICATION OF ERROR NO. 6.

“The Court erred in not finding that the injury sustained by the longshoreman arose from appellant shipowner’s breach of its non-delegable duty to furnish the longshoreman a seaworthy ship and from appellee stevedore’s sole negligence.”

Since the vessel here was unseaworthy, but without a showing or any proof of negligence on appellant shipowner’s part, and since the appellee stevedore was clearly negligent and proceeded to work the hold with full knowledge of the danger, the Court below, even by disregarding the *Ryan* theory of recovery and even disregarding the principles established by *U. S. v. Rothschild*, 183 F.2d 181 (9th Cir. 1950) (hereinafter discussed under Section III of this Brief) should have granted indemnity. In other words, even if the Court correctly interpreted the law as allowing indemnity only where the stevedore was liable to an injured longshoreman without fault on its part or for breach of its

non-delegable duty to furnish a seaworthy ship, recovery over should have been allowed because the shipowner here was liable only for unseaworthiness without negligence on its part and because the injury resulted from the independent negligence of the stevedore.

The obligation of a shipowner to the injured longshoreman here was based upon the theory of liability without fault expressed as the obligation to supply a seaworthy ship and a safe place in which to work. Negligence on the part of appellant simply was not proven at the trial. In this connection, *Valerio v. American President Line*, 112 F. Supp. 202 (S.D. N.Y. 1952) is instructive. In that case, the employees became infected by contact in unloading a cargo of cashew-shell oil. The oil had leaked from the drums to the decks and cargo hooks. This cargo was known to be hazardous, requiring special precaution. The court held the shipowner's duty to furnish a safe place to work and to warn of the dangers of handling this cargo was non-delegable, for the breach of which the shipowner was liable. The court also found, however, that the employer had contracted with the shipowner to perform the duty; i.e., to warn, to provide proper supervision, and to furnish gloves and salves, and that this breach of contract was the "primary cause" of the injuries giving rise to the shipowner's right of full indemnity.

The case of *Berti v. Compagnie etc.*, 213 F.2d 397 (2nd Cir. 1954), also illustrates this line of cases. There the court considered a contract almost identical with the contract presently before this court. The Court of Appeals for the Second Circuit held that indemnity over was recoverable where the stevedore's negligence was the sole, active, or primary cause, even where defective equipment was supplied by the shipowner. The court said, at page 401 :

"American * * * was fully aware of the condition of the ship's equipment and failed to take proper precautions. Hence, on this showing, American's fault was primary, and on the record now before me, Compagnie was legally entitled to indemnity for any judgment which plaintiff might ultimately recover."

Accord:

Crawford v. Pope and Talbot Inc., 206 F.2d 784 (3rd Cir. 1953).

III.

ALTERNATIVELY, NEGLIGENCE OF SHIPOWNER DOES NOT BAR INDEMNITY WHERE STEVEDORE'S NEGLIGENCE ACTIVE AND PRIMARY.

A. Summary of Argument.

Even if appellant was guilty of some negligence, that negligence was of the passive or secondary sort. The negligence of the stevedore was the active, primary, and proximate cause of the accident which resulted in Williams' injury. Based upon recognized principles of common law indemnity recovery should be awarded in favor of appellant shipowner.

Assuming for the purposes of argument that the contractual indemnity principle of the *Ryan* case is inapplicable, and further assuming that the Court below did not err as set forth in Section II of this brief, and further assuming that the ship was not only unseaworthy but that appellant shipowner was also guilty of negligence, indemnity should still be awarded under the circumstances of this case.

B. Specifications of Error Nos. 7, 8 and 9.

"7. The Court erred in failing to find that even if appellant was negligent, the injury to the longshore-

man was caused by an independent act of negligence on the part of appellee which supervened in time and became the active, primary or proximate cause of the injury.

“8. The Court erred in holding that appellant’s right to indemnity against appellee in the absence of an express contractual indemnity provision is allowable only in the event the former fails to perform its non-delegable duty to furnish a seaworthy ship.

“9. The Court erred in holding that appellant’s right to indemnity against appellee stevedore in the absence of an express contractual indemnity provision is not allowable where appellant’s negligence was inactive or passive and appellee’s negligence was the active or primary cause.”

It was pointed out in the *Ryan* case that although reliance could be placed upon a contractual obligation nevertheless in previous cases decided in the lower courts, liability for indemnity had hinged on the terms of the relative responsibility of the parties for the tort and such courts dealt with concepts of primary and secondary or active and passive tortious conduct. See, for example, *Brown v. American-Hawaiian Steamship Co.*, 211 F.2d 16 (3rd Cir., 1954); *McFall v. Compagnie Maritime Belge*, infra; *Weinstock*, “*The Employer’s Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*”, 103 U. of Pa. L. Rev. 321 (1954). This law review article prefaces its discussion and analysis of cases on the subject with the following remarks at p. 323:

“However, if the shipowner is liable to the employee, as for negligence or failure to furnish a safe place to work, or even liable without fault for breach of warranty of seaworthiness, there may be an accompanying fault¹⁰ on the part of the employer. There may be two causes which are concurrent; or they may be succes-

sive, in point of time, under circumstances which will call forth a judicial finding that one is 'passive' as contrasted with the other which is 'active'; they may be equal, or there may be a difference in degree so as to classify one as 'primary' and the other 'secondary.' There may be a contract in effect between employer and shipowner which may provide the basis for a claim of indemnity founded on express or implied obligations arising thereunder."

Footnote 10:

"10. The concept of 'fault' or 'negligence' by the employer, in this connection, is unsatisfactory, for the tort duty of the employer to the employee has been eliminated by statute. But the decisions make it impossible to avoid use of the term 'negligence' or its equivalent; although the cases here discussed do not, for the most part, observe any distinction, the term should more accurately be used to describe that conduct which would constitute a breach of duty in the absence of statutory immunity."

In *McFall v. Compagnie Maritime Belge* (1952), 304 N.Y. 4, 328-332, 107 N.E. 2d 463, 471-473, it was pointed out that the stevedoring contractor entered into an agreement with the shipowner to perform loading operations and it was under obligation to perform that work in a careful and prudent manner. The court stated, however, that the cases established the principle that even in the absence of an express covenant of indemnity, the shipowner had the right of recovery if the evidence was such as to establish the stevedore as the primary wrongdoer.

Even aside from liability based on contract alone, if common-law principles of indemnity become relevant to the issues of this case, once a contract relationship between the parties is established indemnity will lie on a tort basis

where the stevedore's fault is primary. *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953)

"The right to indemnity can arise by virtue of an express contract, or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case, the indemnitee has a claim which is independent of, and does not derive from, the injury to the employee except in a remote sense not within the provisions of section 5." (Longshoremen's and Harbor Workers' Compensation Act.)

Accord:

Brown v. American Hawaiian Steamship Co., supra.

As pointed out above, there is some suggestion in the cases preceding the *Ryan* case that a comparison of fault is relevant to the issues before the court. If this is so, the trial court below has suggested a severe limitation on the right to indemnity representing a serious departure from the generally accepted common-law view.

Even if, as suggested by the trial court, the shipowner here is chargeable with something more than liability without fault, he can be found guilty of no more than passive or inactive negligence (Finding No. 12). The proximate, primary, or active cause of the injury was the negligence of appellee. The courts have been precise in setting forth the conditions under which indemnity may be found in such cases. It is stated in *Davis v. American President Lines, Ltd.*, 106 F. Supp. 729 (N.D. Cal. 1952), at 730 that:

"Both the common law and admiralty courts have recognized a right to indemnity as distinguished from contribution in a person who has responded in damages caused by the wrong of another. This right has been recognized in *two general classes of cases—those in*

which the person seeking indemnification was without fault and those in which such person was passively negligent, but the primary cause was the active negligence of another." (Italics ours.)

The court below appears to concede this first basis of liability but since it found passive negligence on the part of the shipowner appellant (Finding of Fact No. 12) denied liability under the second class of cases. This was error.

This second basis also finds support in section 97 of the *Restatement of Restitution*, where it was said:

"A person whose negligent conduct, combined with the reckless or intentional wrongful conduct of another, has resulted in injury for which both have become liable in tort to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tort-feasor could not have done so."

See also *Lukasiewicz v. Moore-McCormack Lines*, 104 F. Supp. 572 (E.D. N.Y. 1952); *Raskin v. Victory Carriers*, 124 F. Supp. 879 (E.D. Pa. 1953). In this latter case, it was stated:

"In the McFall case the court said that such implied contract of indemnity will arise in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent."

In two cases decided in this circuit it was held that for the stevedores knowingly to make use of defective gear aboard the vessel and supplied by the shipowner constitutes an active, or primary and superseding cause of the injury occasioned thereby.

United States v. Arrow Stevedoring Co., 175 F.2d 329, 331 (9 Cir. 1949)

"On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government (shipowner) in no way participated in the wrongful use of the door, which otherwise would have been made secure in the usual manner described * * *"

United States v. Rothschild International Stevedoring Company, 183 F.2d 181 (9th Cir. 1950)

where the court quotes with approval from *The Mars*, 9 F.2d 183, 184, (S.D. N.Y. 1914) as follows:

"* * * where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence * * * we say that the consequences of the first act of negligence did not include the consequences of the second.

"The Restatement of Torts Sec. 441 is to the same effect: '(2) The cases in which the operation of an intervening force may be important in determining whether a negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a *situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious*. In such cases, the actor's negligence is often called passive negligence, while the third person's negligence which sets the intervening force in active operation, is called active negligence.'"
(Italics ours.)

Based on the foregoing principles, the court granted indemnity for injury to a stevedore arising from a defective winch

which had been twice reported to the shipowner by the employer, indemnity being based on the principle that although both were negligent, the employer permitted his employee to continue working in face of the danger and was therefore guilty of an independent act of negligence supervening in time.

Accord *Raskin v. Victory Carriers, Inc., supra*, where it was held that, where a dangerous condition on a vessel has been created by the negligence of the shipowner, it is active negligence for the contracting stevedore knowing of the dangerous condition to permit its employees to work on the ship and relying on the chance that nothing would happen, and shipowner is entitled to indemnity.

The record is replete with evidence of the extraordinary careless conduct of appellee's employees, who, apprehending the peril presented by the hatch beam with its missing lock, nonetheless continued to load No. 1 lower hold as if the danger were not present. Thus balanced against the fault or neglect, if any, of the shipowner we find a series of acts and omissions on the part of appellee's employees which denote negligence of the grossest sort. In the present case a combination of factors clearly shows that the principal fault lies with the stevedores. Each supervisory employee of appellee, aware of the danger, had it within his power to avert the catastrophe which befell Williams. Taken singly, the actions of each were without any reference to any reasonable standard of care, taken collectively a causal chain was forged which became the sole, primary or active cause of the injury to Williams.

The trial court could not have regarded the appellant and appellee here completely *in pari delicto* for as stated in its opinion,

“The evidence clearly shows that plaintiff’s negligence was passive and that defendant continued its work with knowledge of this dangerous condition. Therefore defendant’s share of the responsibility would be greater for the damages which ensued.” *American President Lines v. Marine Terminals Corp.*, 1955 A.M.C. 1879.

In the infinite variety of circumstances where indemnity has been sought the courts have used various terms to distinguish between the grade of fault attributable to the participating wrongdoers so as to justify the imposition of the entire loss on the one who is regarded as the principal offender. The acts of the parties are variously contrasted as positive or negative, see *Washington Gas Light Co. v. District of Columbia*, 161 U.S. 316 (1896) and as active and passive in others. See *Gray v. Boston Gas Light*, 114 Mass. 149 (1892). Whatever the terminology, the inquiry is always whether the difference in the gravity of fault of the participants is so great as to throw the whole loss upon one. We submit that even if some negligence is attributable to appellant such an inquiry in this case will compel stevedore appellee to indemnify shipowner appellant.

It has been aptly demonstrated that the beam in question was made dangerous by the activities of the stevedore company and by its deliberate recklessness in continuing to work in the face of a danger clearly apprehended by its supervisory employees. This was an intervening or superseding event, constituting the active or primary cause of the injury to Williams. The peril was known to appellee’s employees, and could have been averted by them. American President Lines employees participated in no activity relative to this beam once the stevedores were aboard the vessel. It was appellee, not appellant, that knowingly proceeded

with loading cargo under this unlatched beam and hooked the bridle into it, dropping it to the hold below.

It is therefore submitted that the lower court erred as outlined in Specifications 7, 8 and 9, and instead should have ordered indemnity of shipowner appellant by stevedore appellee whose negligence was the primary and active cause of the injury.

IV.

INDEMNITY, NOT CONTRIBUTION, STILL PERMITTED UNDER HALCYON V. HAENN, AMERICAN MUTUAL V. MATTHEWS

A. Summary of Argument.

The principles enunciated in the cases of *Halcyon Lines v. Haenn Ship Refitting Corp.* and *American Mutual Liability Insurance Co. v. Matthews*, relied upon by the trial court in its conclusions of law do not support the conclusions reached therein, but to the contrary support recovery by appellant in its suit for indemnity. Further, *States Steamship Co. v. Rothschild International Stevedoring Co.* relied upon by the trial court does not foreclose recovery by appellant (Brief Section IV, Specification of Error No. 10).

B. Specification of Error 10.

“The Court erred in conclusion of law No. 5 in applying the law of *American Mutual Liability Insurance Co. v. Matthews*, 182 Fed. 2d 322 (2d Cir. 1950), and *Halcyon Lines v. Haenn Ship Refitting Corp.*, 342 U.S. 282 (1952) to the facts of this case.”

The court below ignored the contractual relationship between the parties to this litigation and the fact that the present suit is one for indemnity, rather than contribution, resting its decision on *Halcyon Lines v. Haenn Ship Refitting Corp.*, 342 U.S. 282 (1952), and *American Mutual Liability Insurance Co. v. Matthews*, 182 F.2d 322 (2d Cir.

1950). It is true that the *Halcyon* case negated the right of contribution between joint tortfeasors in non-collision admiralty cases; yet that holding, and the cases subsequent to it, did not foreclose the right of a shipowner to be indemnified by the stevedore. The *Halcyon* case has been universally interpreted to distinguish indemnity from contribution. The core of the *Halcyon* case is expressed in the court's conclusion that "it would be unwise to attempt to fashion new judicial rules of contribution". This does not bar the enforcement of an independent claim for indemnity, whether or not that claim is based upon a contractual relationship. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.*, supra. *Crawford v. Pope & Talbot, Inc.*, supra.

This conclusion was also reached by Judge Carter of this district in his memorandum opinion denying appellee's motion in this case to dismiss the instant complaint. There the court disposed of the contention that the *Halcyon* case was controlling in an indemnity case of this nature. *American President Lines v. Marine Terminals Corp.*, 128 F. Supp. 603 (N.D. Cal. 1955).

The case of *American Mutual* does not lend support to the decision of the trial court. That case is distinguishable on its facts and was based on contribution not indemnity. In that case, the shipowner supplied a defective rope without inspecting it, and the stevedores used it, also without inspection, although the defect would have been revealed had inspection been made. Plaintiff longshoreman suffered injury as a result. On these facts, the shipowner responded in damages and brought suit for contribution. The court denied recovery based upon the *Halcyon* case. The court also affirms there that where a contractual relationship exists between the shipowner and the stevedore and the

primary cause of the injury to the longshoreman is the breach of the contractual duty owed by the promisee to do the work properly and safely, recovery may be permitted on an indemnity theory. The court pointed out that the stevedore there had no contractual duty to detect defective equipment supplied by the shipowner and did not in fact know of the danger. Contrast the facts there with the present case, where the contract provided appellee would remove beams, and perform its work safely and efficiently and where the missing safety latch was discovered by appellee's longshoremen, the danger recognized, and safe alternatives ignored by them.

See Weinstock "The Employers Duty to Indemnity Shipowners for Damages Recovered by Harbor Workers," 103 U. of Pa. L. Rev. 321 at 330 and 337 for a further discussion of the *American Mutual v. Matthews* case.

To the extent the court below relied upon the case of *States Steamship Company v. Rothschild*, 205 F.2d 253 (9th Cir. 1953) it does not support the conclusion that indemnity is allowable only where the ship is unseaworthy and the owner not negligent. This case was cited by the court below for the theory that the shipowner may recover in liability only where he is liable without fault as the result of another's act, unless a specific contractual indemnity provision is present. This view is demonstrably false. The court in the *States* case, it is true, considered the shipowner's allegation that it was liable without fault only because of its non-delegable duty to supply a seaworthy ship and a safe place in which to work, the court holding this stated a cause of action for indemnity. The court there, in so doing, however, did not negate the right to indemnity where the indemnitee is passively negligent, but the primary cause of the loss was the act of negligence on the part of another. It is

essential too to limit that case to its peculiar facts. There the court was confronted with the relationship between a stevedore employed, not by the shipowner, but by a space charterer, the United States Army. Thus there was no contractual relationship there between the shipowner and the stevedore. The court, in *States Steamship Company v. Rothschild*, supra, specifically distinguished those situations where either (1) there was an express indemnity provision or (2) where there was a contractual relationship between the putative indemnitor and indemnitee such as exists here.

In view of the contractual relationship here the court should have permitted indemnity even aside from the *Ryan* case on the common law basis of one passive tort feisor and one active tort feisor, as set forth in Section III.

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW CONFLICT, ARE UNSUPPORTED BY THE EVIDENCE, AND DO NOT SUPPORT THE JUDGMENT BELOW.

A. Summary of Argument.

Conclusions of Law 1, 2 and 5, all to the effect that appellant was jointly and concurrently negligent with appellee, and Conclusion of Law 4, that appellant's concurrent negligence went well beyond a mere passive act of negligence, are unsupported by evidence or by any findings of fact. Said conclusions are further inconsistent with Findings of Fact Nos. 3, 4 and 5 and conflict with Finding No. 12.

While we recognize that the reviewing court does not review evidence as an original fact-finding tribunal or settle conflicts in evidence, the review court does not accept findings either clearly erroneous or unsupported by the evidence nor respect conclusions of law which do not rest properly

on the facts so found. It is thus open to this court to decide whether findings are supported by the evidence and whether the evidence gives the requisite support to the conclusions reached. *Compagna Corporation v. Harrison*, 114 F.2d 400 (7th Cir. 1940).

If the ultimate finding of a court is contrary to evidentiary findings or based upon a misapplication of the law to evidentiary findings, it is not binding upon the appellate court. *United States v. Armature Rewinding Co.*, 124 F.2d 589 (8th Cir. 1942).

There are inconsistencies and conflicts between certain findings and conclusions which warrant reversal of the judgment, entirely aside from the arguments presented in Sections I, II, III and IV of this brief.

B. Specifications of Error Nos. 11, 12, 13, 14 and 15.

SPECIFICATION OF ERROR NO. 11:

“The Court erred in that conclusion of law No. 4 conflicts with finding of fact No. 12.”

SPECIFICATION OF ERROR NO. 12:

“The Court erred in that the findings of fact are insufficient to support conclusion of law No. 4.”

SPECIFICATION OF ERROR NO. 13:

“The Court erred in that conclusions of law Nos. 1, 2, 4, and 5 are inconsistent with finding of fact No. 12 and are not supported by the evidence or any finding of fact.”

SPECIFICATION OF ERROR NO. 14:

“The Court erred in that there is no evidence or finding to support conclusion of law No. 2, that the shipowner knowingly supplied or knew that a particular hatch beam lacked a locking device.”

SPECIFICATION OF ERROR NO. 15:

“The Court erred in that the findings of fact are insufficient to support conclusions of law Nos. 1 and 2 that plaintiff and defendant were jointly and concurrently negligent and said conclusions are contrary to the findings of fact.”

Conclusions of law Nos. 1, 2 and 5 mention joint and concurrent negligence of both parties. Conclusion of law No. 2 defines joint and concurrent negligence on the part of both parties in that

“the shipowner knowingly supplied a hatch beam totally lacking a locking device; and both of said parties with full knowledge of said lack of a locking device permitted the unloading and loading operations to be performed, without repairing or replacing said locking device, or without removing said hatch beam.”

We submit that neither the findings nor the evidence support this conclusion. Compare conclusion No. 2 with the following findings of fact.

Finding of Fact No. 3: “That at the time of the arrival of said vessel in San Francisco, and prior to the defendant going aboard for the purpose of discharging the vessel’s cargo, there was a missing locking device on the number 2 King strongback in the lower ’tween deck hatch.

Finding of Fact No. 4: “That the plaintiff knew and was aware of the absence of locking devices on some of the strongbacks on the vessel and communicated this information to the defendant.”

Finding of Fact No. 5: “That plaintiff’s chief officer had on January 29, 1952, communicated to defendant’s walking boss, Ernest Bleile, a warning that some beams aboard the vessel might lack locking devices and cautioned him to remove any defective beams.”

Finding No. 3 is based upon a stipulation between counsel as follows:

“Mr. Gerhardt: Your Honor, we have a stipulation that prior to the accident and the injury to Mr. Williams the safety latch on one end of No. 2 beam, No. 2 strongback, in the lower ’tween deck, was missing.

The Court: So stipulated?

Mr. Taylor: So stipulated.

Mr. Gerhardt: That stipulation, however, Your Honor, is not a stipulation that the plaintiff knew of the missing latch.” (Tr. 103)

“Mr. Gerhardt: We have stipulated this was missing and the ship was unseaworthy in that regard.” (Tr. 168)

Findings Nos. 4 and 5 are based upon the testimony of walking boss Bleile as outlined under Section II of the brief, Subsection B. There is no other finding and no evidence whatever to show knowledge of the shipowner either that the device was missing from a particular hatch beam or that the shipowner permitted work to continue under hatch beam No. 2 with knowledge of this particular dangerous condition. The evidence is (Tr. 289) that the first mate of the vessel had called to the stevedore’s attention there might be locks missing on some beams and warned defendant to be on the lookout for defective beams and to effect removal of excess beams. There is no evidence or finding to show the shipowner condoned or participated in the stevedore’s subsequent negligent acts after the stevedores employees found the lock missing from No. 2 beam.

It is true there is a finding, No. 11 (Tr. 34), that the shipowner had a duty to supply, repair and maintain locking devices, but there is no evidence and no finding that the stevedore’s employees who found the missing lock called it

to appellant's attention or that appellant was in any way aware of the dangerous condition under which work was proceeding in No. 1 hold.

Thus there is no support, no foundation, no basis, for the reference to joint and concurrent negligence in conclusions of law Nos. 1, 2 and 5. Neither is there any evidence or finding to support conclusion of law No. 4 which provides as follows:

Conclusion of Law No. 4: "That the concurring negligence of the shipowner went well beyond a mere passive act of negligence based on its non-delegable duty to furnish a seaworthy ship and a safe place to work."

We have searched the record in vain for any facts supporting knowledge on the part of the shipowner that beam No. 2 was defective or if it had such knowledge of any facts showing any knowledge of the shipowner or permission on its part that loading and unloading operations were to be performed under such conditions or any facts supporting the conclusion that the shipowner's negligence (if it was negligent) went beyond a mere passive act of negligence. Not only is there no such evidence but finding No. 12 is in complete conflict with conclusions Nos. 1, 2, 4 and 5.

Finding of Fact No. 12: "That plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks." (Tr. 34)

In view of a complete absence of evidence and in light of Finding of Fact No. 12, Conclusions of Law Nos. 1, 2, 4 and 5 were improper and unsupported in concluding that appellant and appellee were jointly and concurrently negligent and that the negligence of the respective parties combined to cause the injuries to Williams.

As we have demonstrated, recovery on an indemnity theory may be had where one joint tortfeasor is guilty of passive negligence and the accident results from the active or primary negligence of another. Assuming, without conceding, that appellant was negligent and knew of the defective beam this negligence was of the passive sort but with appellee continuing its work knowing of the danger according to Finding of Fact No. 12 and therefore appellant's right to indemnity is not destroyed.

The conflict between the findings of fact and conclusions of law suggests the court has adopted an erroneous rule that indemnity will not be allowed to a party guilty of any negligence whatsoever, and that as long as a party is guilty of any negligence at all, no matter how slight, it becomes a joint concurring tortfeasor irrespective of any comparative or relative fault or of the fact that its negligence may only be passive and the negligence of the other may be active. We have shown above under Section III of this brief that the courts will balance the negligence of one tortfeasor as against the other in reaching a conclusion as to whether indemnity should be awarded.

Conclusion

A. On the basis of the breach of the stevedore's contractual obligations to perform its work safely, express and implied, recovery for indemnity should be awarded to appellant.

B. Alternatively, indemnity should be awarded appellant on the basis that it was liable without fault, and the cause of the accident was the sole negligence of appellee.

C. Alternatively, indemnity should have been awarded on the basis that appellant was passively negligent while appellee was primarily or actively so.

D. The conclusions of law are so clearly erroneous, and there is such substantial conflict between the conclusions and findings that the judgment below should be reversed.

For the foregoing reasons it is respectfully submitted that the Judgment of the District Court should be reversed and indemnity awarded to appellant American President Lines, Ltd.

Dated: San Francisco, California, March 1, 1956.

Respectfully submitted,

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No. 14,959

United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellant,

vs.

MARINE TERMINALS CORP.,
a corporation,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLEE'S REPLY BRIEF.

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**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PRESIDENT LINES, LTD., a corporation, vs. MARINE TERMINALS CORP., a corporation,	<i>Appellant,</i> <i>Appellee.</i>
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**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLEE'S REPLY BRIEF.

I.

STATEMENT OF FACTS.

We feel that Appellant's Statement of Facts in fairness to our position requires a more complete statement of certain essential facts. This is particularly true due to omission of certain facts without which a complete presentation of the issues cannot be had.

On January 29, 1952, the President "Polk" was in San Francisco, and the agents, servants and em-

ployees of Appellee, Marine Terminals Corporation, went aboard the vessel for the purpose of discharging the vessel's cargo.

There was a written stevedoring contract between the parties. (Plfs. Ex. 16, Tr. 48.) This contract contained *no* agreement, covenant or language for indemnity.

When the vessel arrived in port some of the strong backs or hatch beams were entirely devoid of locking devices (Tr. 289). This information was conveyed by the mate of the vessel to Ernest Bleile, the walking boss for the Appellee (Tr. 288-289). Mr. Bleile then instructed the gangs to remove excess beams from No. 1 hatch and to place them on deck. He also issued instructions to remove *any unsafe beams that might be found*. (Tr. 293.) It is undisputed that the mate of the vessel did not specifically call attention to or point out any particular beams which lacked locking or safety devices. The mate merely reported to Mr. Bleile:

“That he would like me to remove all excess beams, which I didn't use for handling cargo, because he had some beams on the ship which had faulty locking devices.” (Tr. 289.)

Asked more specifically concerning this conversation with the first mate, Mr. Bleile said (Tr. 289):

“He called me below. He said, ‘Will you keep your eyes open? I believe I have strong backs here which have no locks.’”

On the second day, January 30, 1952, work continued and one defective hatch beam on the tweendeck

in Number One Hold *which did not have any locking devices* thereon was dislodged without negligence on this part by the bridle and hook of the winch driver, Paquette, and fell into the lower hold causing severe personal injuries to the stevedore, Mr. Williams. (Tr. 115, 116, 126.)

The operation of the winch operator, Mr. Paquette, who testified on behalf of the plaintiff, reveal that the cause of the accident was the lack of the locking device (Tr. 164) and that had the locking device been on the beam the bridle and hook could not have dislodged it, that very little weight is required to dislodge an unlocked strong box, (Tr. 164) and that it was the sole duty and responsibility of the ship to “*install the lock*” (Tr. 168) and that the locks used in the case at bar were part of the strong back (Tr. 168). This testimony is corroborated by the plaintiff’s witness, Mr. Reuben Swanson. (Tr. 189.)

It is, likewise, undisputed that the bridle and hook, used by Mr. Paquette, the winch operator, was being used in a normal and usual manner with a swinging motion (Tr. 155, 157, 158) as the ship was not on an even keel and that he did not know that the strong back lacked a locking device, until after the accident. (Tr. 164.)

In Appellant’s Statement of Facts (Opening Brief p. 5) much is made of the point that Mr. Paquette would have preferred to have had more than one hatch open (Tr. 156). But the fact remains that the only eyewitness to the accident, Mr. Paquette, did definitely state that had the locking device been on

the strong back, the accident could not have occurred. (Tr. 164.)

There is no dispute in the evidence that it was the duty of the ship to supply, repair, install and maintain the locking devices. (Tr. 168.) The evidence is, likewise, conclusive that the ship owner did not supply any substitute locking devices or other equipment for the purpose of securing the hatch beam in question.

There were certain Marine Safety Code Regulations which placed reciprocal duties on both the ship and the stevedore to make gear and working conditions safe. Rule 201 (Plfs. Ex. 18) (Tr. 283) required the owners or operators of the ship to provide safe ships' gear and equipment and a safe working place for all stevedoring operations on board ship. Other safety regulations placed similar duties on the part of the employer stevedoring company.

These are the essential facts concerning the contract, the accident and the reciprocal duties of the ship and the stevedoring company.

The trial Court made certain findings of fact consisting of eighteen separate findings (Tr. 32-35) the most pertinent being as follows:

II.

FINDINGS OF FACT.

“I. On January 29, 1952, plaintiff's vessel, President Polk, was in San Francisco for the pur-

poses of loading and unloading cargo. That the defendant, Marine Terminals Corporation, pursuant to a written stevedoring contract went aboard for the purpose of discharging the ship's cargo.

2. That the stevedoring contract, between said parties contained no agreement, covenant or language of indemnity.

3. That at the time of the arrival of said vessel in San Francisco, and prior to the defendant going aboard for the purpose of discharging the vessel's cargo, there was a missing locking device on the number 2 King strongback in the lower 'tween deck hatch.

4. That the plaintiff knew and was aware of the absence of locking devices on some of the strongbacks on the vessel and communicated this information to the defendant.

5. That plaintiff's chief officer had on January 29, 1952, communicated to defendant's walking boss, Ernest Bleile, a warning that some beams aboard the vessel might lack locking devices and cautioned him to remove any defective beams.

6. That at the time of the accident, only one section of the three sections of the lower 'tween deck hatch square was open.

7. That on the second day of the unloading of the cargo of said vessel, the defendant's winch driver, Mr. Paquette, dislodged a strongback by bridle and hook being manipulated by him in the cargo unloading operations. That upon becoming dislodged said strongback fell into the lower hold striking and causing personal injuries to Mr. Williams, a stevedore employee of the defendant.

8. That the winch driver, Mr. Paquette, had prior to, and at the time of the dislodgement of said hatch beam, been using, operating and manipulating the bridle and hook in the usual and customary manner and free of any negligence whatsoever.

9. That the main purpose of locking devices of strongbacks is to prevent the dislodgement of strongbacks by being caught or hooked by the bridle and hook used in loading and unloading operations.

10. That had said strongback been equipped with a locking device, it would not have become dislodged and in fact could not have become dislodged by the said bridle and hook used in said loading or unloading operations.

11. That it was the duty of the vessel's owners (plaintiff herein) to supply, repair and maintain the locking devices used on said hatch beam.

12. That plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks."

III.

CONCLUSIONS OF LAW.

The Trial Court made certain Conclusions of Law based on the Findings of Fact. These Conclusions were as follows (Tr. 35-36):

"1. That both of the parties, plaintiff and defendant, were jointly and concurrently negligent

in the premises, which joint and concurrent negligence caused the accident and resulting injuries to Mr. Williams, the stevedore.

2. That the joint and concurrent negligence of the said parties consisted of negligence on the part of both of them in that the ship-owner knowingly supplied a hatch beam totally lacking a locking device; and both of said parties with full knowledge of said lack of a locking device permitted the unloading and loading operations to be performed, without repairing or replacing said locking device, or without removing said hatch beam.

3. That both parties well knew or should have known from experience that a hatch beam totally lacking in locking devices could be easily and upon even slight contact with the bridle and hook, used in loading and unloading, become dislodged and fall and cause serious injury to any person upon whom said hatch beam might fall.

4. That the concurring negligence of the ship-owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.

5. Although Mr. Williams' (the stevedore) injuries proximately resulted from the joint and concurring negligence of the ship (plaintiff) the stevedoring company (defendant), plaintiff's demand for indemnity against the defendant must be denied upon the authority of *American Mutual Liability Ins. Co. vs. Mathews*, 182 Fed. 2d, 332, 2 Cir., and *Halcyon Lines vs. Haenn Ship Refitting Corp.*, 342 U.S. 382.

6. That plaintiff is not entitled to recover from the defendant, upon its action for indemnity.

7. That judgment be entered herein, upon these findings of fact and conclusions of law for the defendant.

8. That each party pay their own costs in this action incurred.”

IV.

SUMMARY OF ARGUMENT.

A reading of Appellant's Specifications of Error and Summary of Argument seems to be based primarily on its contention that:

A. That the stevedore contract, although containing no provision for indemnity, should be construed under the decision of our Supreme Court in *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 100 L. Ed. Advance p. 146, as requiring indemnity irrespective of Appellants own joint and concurring negligence. (Spec. of Error No. 1.)

B. That the *sole* cause of the accident was the negligence of appellee as contrasted to mere unseaworthiness of the vessel supplied by Appellant. (Spec. of Errors Nos. 2-9.)

C. That the principles enunciated in the cases of *Halcyon Lines v. Haenn Ship Refitting Corp.*, 342 U. S. 282 and *American Mutual Liability Insurance Co. v. Mathews*, 182 Fed. 2d. 322 (2d Circuit) do not support the conclusions of law

made by the trial Court. (Spec. of Error No. 10.)
 D. And finally that the Conclusions of Law 1, 2 and 5, to the effect that Appellant was jointly and concurrently negligent are not supported by the evidence and are inconsistent with Findings of Fact number 12. (Spec. of Error Nos. 11-15.)

V.

ARGUMENT.

A. APPELLANT'S SPECIFICATION OF ERROR NO. 1. THE RYAN CASE. (RYAN STEVEDORING CO. v. PAN-ATLANTIC S. S. CORP., (..... U.S., 100 L.Ed. A. 146.)

Our Supreme Court in this recent case held that no express covenant for indemnity is necessary to permit the recovery thereof where the contract itself has been breached. This obligation the Court said is comparable to a manufacturers' warranty of soundness of its manufactured product.

However, before any case can be properly evaluated the facts of the case should be discussed. The facts in that case reveal that the entire stevedoring operations and the resulting accident and injuries were the result of sole active negligence of the stevedore brought about while using *entirely its own equipment and in failing to properly secure certain bales with chocks or ropes* so that one of the bales (freight) toppled over on the stevedore. (Added emphasis ours.)

Contrast that situation with the case at bar. Here we have the cause of the accident clearly established as being an integral part of the ship's own equip-

ment—the hatch beam which was entirely devoid of any locking device and knowingly supplied by the ship owner. The activity of the Appellee stevedoring company was merely to unseat the hatch beam, without any negligence on their part in the normal use of the winch and bridle. (Tr. 115, 116, 126, 168.)

In the *Ryan* case nothing defective was supplied by the ship. No gear, apparatus or appliance owned or required to be supplied by the ship was involved in the accident whatsoever. The liability of the ship was based on *mere unseaworthiness of the vessel*.

Again in the case at bar not only was the instrumentality (defective hatch beam) which was the proximate cause of the accident and resulting injury knowingly supplied by the vessel (Tr. 288-289) but the sole duty to install the missing locking device was upon the ship owner, the Appellant herein. (Tr. 168.)

If the *Ryan* case meant what Appellant contends it would mean that irrespective of what participation the vessel owner might have in an accident—if there was a stevedoring contract, the stevedoring company must indemnify. Such was not the holding in the *Ryan* case we most respectfully contend and with the exception of its holding in respect to the effect of the Longshoreman Compensation Act, we do not see that it has any applicability to the instant case at all.

The Mathews Case.

The holding in the case of *American Mutual Liability Ins. Co. v. Mathews*, 182 Fed. 2d 332 is, we contend, the proper rule of law where the accident is in relation to defective equipment supplied by the ship. In that case the ship owner furnished a patently defective guy rope, which was negligently used by the stevedore. The Court in part said:

“In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the ship owner to be used for the very purpose to which it was put, nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the ship owner against liability arising out of the ship owners’ own negligence. In the *absence* of an express promise, such an implication would be utterly unreasonable, hence we can find no contractual basis for indemnity or contribution. To impose a non-contractual duty of contribution on the employer is pro tanto to deprive him of the immunity which the statute grants him in exchange for his absolute, although limited, liability to secure compensation to his employees.”

To the same effect is the case of *Shannon v. U. S.*, 119 F. Supp. 706 (D.C.N.Y.); *Slattery v. Marra Bros.*, 186 F. 2d 134 (2 C.C.A. 1951); *Hawn v. Pope & Talbot Inc.*, 198 F. 2d 800 (3 C.C.A. 1952); *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 283.

Hence the absence of an express promise for indemnity to protect the ship against the ship's own negligence, is the point of the *Mathews* case (supra), Without such a provision—no matter what negligence the ship owner or operator might be guilty of and no matter how gross or flagrant its negligence might have been, surely, no indemnity would lie in the absence of such provisions. We do not believe the *Ryan* case has changed this well established rule.

**B. SOLE CAUSE OF ACCIDENT WAS NOT
APPELLEE'S NEGLIGENCE.**

The *sole cause* of the accident was not the negligence of Appellee. The evidence is uncontradicted that the strongback which fell was wholly devoid of locking devices and was known to be in such condition by Appellant (Tr. 289.) What was the proximate cause of the accident? The findings of fact of the trial Court that it was due to the lack of locking devices and became dislodged without negligence on the part of Mr. Paquette, the winch driver, (Findings of Fact 4, 5, 6, 7, 8, 9, 10, and 11 Tr. 33-34) supported the Conclusions of Law 1 to 6, of joint and concurring negligence on the part of both parties and "went well beyond a mere passive act of negligence based on a non delegable duty to furnish a seaworthy ship and a safe place to work." (Conclusions of Law No. 4, Tr. 36.)

Appellant's Specification of Error No. 2.

Specification of Error No. 2 is directed to the Findings of Fact Nos. 4 and 5 that plaintiff knew and was aware of the absence of locking devices on some of the strongbacks and communicated this information to defendant, (Tr. 33); and that plaintiff's chief officer had warned the defendant that some beams aboard the vessel might lack locking devices and cautioned Mr. Bleile, the walking boss, to remove any defective beams. (Tr. 33.) Not only was the evidence supporting these findings uncontradicted but, furthermore, was brought out by plaintiff's own witness. (Tr. 289.) It is also without dispute that *there was a complete absence* of locking devices on No. 2 strongback. (Tr. 115, 116, 126.) We cannot see, how, in face of this evidence Appellee can take the position that (Appellee's Brief p. 18) there was no negligence of the ship owner or (Appellee's Brief p. 20); there was sole negligence of the stevedore.

Specification of Error No. 3.

We feel that Specification of Error No. 3 concerning the customary operation and manipulation of the bridle and hook has been fully answered by the uncontradicted testimony of Mr. Paquette, which has been previously discussed by us in this Brief (p. 3) and needs no further argument, and that Findings of Fact No. 8, (Tr. 33) has been fully sustained by the evidence.

Specification of Errors Nos. 4 and 5.

Specification of Errors Nos. 4 and 5 are directed to (Appellee's Brief 24) the Court not finding that the defendant stevedore company failed to take proper precautions to suspend operations until the defective beam had been removed (Spec. of Error No. 4) and that the winchman, and other employees of the defendant violated certain provisions of the Safety Code. (Spec. of Error No. 5.)

The argument on this point is primarily based on the applicability of Rules 205, 207, 824 and 826, of the Marine Safety Code. (Exhibit 18.) These rules require a safe working place for the stevedore employees and outline certain precautionary duties all relating to safety. However, rule 201 (Exhibit 18) also spells out the duty and requirement that the owner or operators of the vessel are to provide safe ships' gear and equipment. In other words, it is clear that both the ship owners or operators and stevedores have reciprocal duties to try and prevent accidents by requiring the ship to furnish safe gear and equipment and the stevedore to operate with care and circumspection.

Assuming that both Appellant and Appellee were performing in violation of these rules in that *both* were jointly and concurrently negligent—as the findings of the trial Court specifically found, what would have been added or changed by making additional findings that each party violated certain safety code provisions? Such a findings would, if made, merely

have been a further or additional factor spelling out the joint and concurrent negligence of each party to this action.

Specification of Error No. 6.

Appellee's contention is that their only negligence was the mere supplying of an unseaworthy ship. The cases cited by Appellee such as *Valerio v. American President Lines*, 112, F. Supp. 202 (S.D.N.Y. and *Berti v. Compagnil etc.*, 213 Fed. 2d 397 (2nd Circuit) well support the rule concerning the supplying of an unseaworthy ship as being a non delegable duty and that where the *sole negligence or primary cause* of the accident is on the stevedore indemnity will be allowed. We do not contend to the contrary. But we do contend that the rule is otherwise—where the negligence of the ship goes past the mere supplying of an unseaworthy ship and clearly so when the ship has knowingly furnished defective gear. To impose indemnity for the ship's own joint and concurring negligence in knowingly furnishing hatch beams wholly lacking locking devices is not a mere "unseaworthy act."

The *American Mutual Liability Co. v. Mathews*, 182 F. 2d 332 (2 C.C.A.) and previously discussed in this brief clearly supports our position. In accord are;

Slattery v. Marra Bros., 186 F. 2d 134 (2 C.C.A. 1951);

Hawn v. Pope & Talbot Inc., 198 F. 2d 800 (3 C.C.A. 1952);

Shannon v. U. S., 119 F. Supp. 706 (D.C.N.Y.) ;
Halcyon Lines v. Haenn Ship Corp., 342 U.S.
283.

Some of these cases will be later in this Brief discussed.

Specification of Errors Nos. 7, 8 and 9.

These assignments are merely a restatement of Appellee's contention that their own negligence was only the supplying of an unseaworthy ship and (7) even if they were negligent there had been a supervening act of negligence on our part (8) that a right to indemnity exists even if appellant's negligence was more than the supplying of an unseaworthy ship and (9) that even in the absence of an indemnity provision the primary or active negligence on the part of the Appellee stevedore company was the proximate cause and the Appellant's negligence was merely inactive or passive.

The evidence has been reviewed and no useful purpose would be served in repeating that which has already been stated. The Trial Court has made Findings of Fact and Conclusions of Law, amply supported by the evidence that there was joint and concurrent negligence on the part of both parties (Tr. 32-36.)

The trial Court not only determined that the accident would not have occurred if the strongback had been equipped with a locking device (Findings of Fact No. 10) but further that it was the duty of the vessel's owners to supply, repair and maintain

the locking devices used in the loading or unloading operations (Findings of Fact No. 11), that the purpose of the locking devices or strongbacks is to prevent the dislodgement of strongbacks being caught hooked by the bridle and hook used in loading and unloading operations (Findings of Fact No. 9.)

The Court concluded that both parties were jointly and concurrently negligent in causing the accident. (Conclusions of Law No. 1); that such concurrent negligence consisted of negligence on the part of both parties; on the part of the ship owner in knowingly supplying the hatch beam without locking devices (Conclusions of Law No. 2.) That both parties knew or should have known by experience that a hatch beam totally lacking in locking devices could be easily dislodged (Conclusions of Law No. 3); *and that the concurring negligence of the ship owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.* (Conclusions of Law No. 4.) (Added emphasis ours.)

The cases cited by Appellant such as the *Ryan* case, *Brown v. American Hawaiian S. S. Co.*, 211 F. 2d 16 and others, and the Law Review article of the University of Pennsylvania; are not to the contrary. These cases are concerned with mere unseaworthiness, a non delegable duty or "liability without fault," and an analysis of each case on the facts would reveal that the Court was not considering cases of joint and concurring negligence where the very instrumentality causing the accident and

injury was knowingly supplied by the ship owner, nor, we respectfully contend, can the attorneys for appellants find such a case.

Cases Cited and Relied Upon by Appellant.

Brown v. American Hawaiian S. S. Co., 211 F. 2d 16.

The facts reveal that the equipment causing the accident was supplied by the stevedore company and the only participation by the ship was unseaworthiness. We quote from the decision (p. 17.):

“American-Hawaiian denied liability in its answer and filed a third party complaint against Brown’s employer, Luckenbach, in which it asked for contribution and/or indemnity! The basis of this claim are two: (1) *that the equipment which caused the injury was furnished, installed, operated and controlled by and was the property of Luckenbach and that it was supplied pursuant to the stevedoring contract*; (2) that if Brown sustained injuries as a result of the unseaworthiness of any equipment aboard the vessel such unseaworthiness was caused by the negligence of Luckenbach.” (Emphasis ours.)

McFall v. Compagnie Maritime etc., 304 N.Y. 314, 107 N.E. 2d 463.

In that case drums of tetrachloride were roughly handled by the stevedore and were caused to leak emanating fumes causing injuries. The ship, Belgian Line, was guilty of no negligence whatsoever—merely unseaworthiness. Judgment was affirmed against the

stevedore company and Dow Chemical Company the manufacturer, due to alleged faulty packing.

Davis v. American President Lines, 106 F. Supp. 729 (N.D. Cal.). The court made no findings and the question of whether or not the Complaint in Intervention stated a cause of action was resolved. From the few facts that the opinion reveals it would appear that a gangway slipped off the wharf causing certain injuries and that the indemnitor United States "controlled the wharf and set the gangway in place." The Court said (p. 731):

"The recent decision of the Supreme Court in *Halcyon Lines v. Haenn Ship and Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277, negated the right of contribution between joint tortfeasors in non collision admiralty cases. See *Union Sulphur and Oil Corp. v. W. J. Jones & Son, Inc.*, 9 Cir. 195 F. 2d 93. If these are cases of concurrent negligence, Halcyon will prevent recovery on third party complaints. If they are cases involving indemnity, a different issue is posed. In either event, the question cannot be determined in the pleading stage."

United States v. Arrow Stevedoring Co., 175 F. 2d 329, (C.C.A. 9). Several factors distinguish the case from the one at bar. First the Court said (p. 331):

"The testimony is uncontradicted that in this defective condition of the dogs of the port hatch the cover could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors. Such turnbuckle

and gear was right there by the hatch for that purpose.”

secondly, the owner (United States) did not have knowledge of the situation, and thirdly, there was an express contract of indemnity. The Court held as follows (p. 331):

“On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government in no way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow’s Larsen. . . .

Arrow’s contract with the government provides for its liability to the government for such sole negligence in the following language;

‘Article 26. Liability and Indemnity (b) The contractor shall be liable to the Government for any loss or damage . . . etc’ ”.

Lukasiewicz v. Moore McCormick Lines, 104 F. Supp. 572 (E.D.N.Y.) reveals a factual situation where a certain cable was *supplied by the contractor* in making ship repairs. Again we have the case of no negligence of the ship owner and a liability without fault predicated only on unseaworthiness created by the contractor.

Raskin v. Victory Carriers, 124 F. Supp. 879 (D.C. E.D. Penn.) clearly does not support appellant’s position and emphatically supports our position. In that case *no facts* are set forth, however, the follow-

ing language of the Opinion is worthy of comment. The Court in part said (p. 880):

“In the McFall case [107 N.E. 2d 471] the Court said that such implied contract of indemnity will arise . . . Whether negligence is passive or active, is, generally speaking, a question of fact for the jury.”

We are in agreement that that issue was for the Trial Court to determine (serving as the sole juror) and his findings and conclusions were adverse to the position of appellee as we have heretofore pointed out. Such findings should be sustained unless some obvious error of law has intervened or some serious mistake of fact has been made. *Wingate v. Bercut*, 146 F. 2d 725 (C.C.A. 9th.) Accord, *State Farm Mutual Auto. Ins. Co. v. Coughron*, 92 F. 2d 239 (C.C.A. 9th.)

C. PRINCIPLES OF CASES RELIED UPON BY TRIAL COURT.

Specification of Error No. 10.

As we understand the argument of appellee it is their contention that the several cases cited by the Trial Court in its Conclusions of Law do not support such findings being “contribution cases.” They further assert that these cases support appellee’s position. Needless to say, we cannot agree with them. Their argument (Appellee’s Brief p. 35-38) is, in our opinion, somewhat difficult to follow. We gather that their main contention is based on their belief and contention (which is the main point throughout their

Brief) that the facts of the case at bar shows sole negligence on Appellee's part and mere liability without fault based on unseaworthiness on appellant's part. This has been thoroughly discussed and we will not repeat the evidence and findings on this question.

The only question that is pertinent on this question (Spec. of Error No. 10) is not what cases the trial Court cited but what is the law on the subject. Whether the trial Court cites any decisions in its findings, opinions or conclusions of law, is not material, if the findings, opinions and conclusions are legally sustainable and sound. Such rule, we contend is so elementary that no citation of authority is necessary.

There are many cases which support the judgment of the trial Court in addition to the two cases cited in Conclusion of Law No. 5. (Tr. 36.)

Additional cases supporting the trial court are as follows:

- States S. S. Co. v. Rothschild Int'l Stevedoring Co.*, 205 F. 2d 253 (C.C.A. 9th);
- Seas Shipping Co. v. Sieracks*, 328 U.S. 85;
- Union Sulphur and Oil Corp. v. Jones & Son*, 195 F. 2d 93 (C.C.A. 9th);
- Slattery v. Marra Bros.*, 186 F. 2d 134 (C.C.A. 2d);
- Johnson v. U. S.*, (D.C. 79 F. Supp. 448;
- Hawn v. Pope & Talbot Inc.*, 198 F. 2d 800 (C.C.A. 3rd);
- Shannon v. U. S.*, 119 F. Supp. 706 (D.C.N.Y.).

The *American Mutual v. Mathews* case (supra p. 11
ur Brief) has been heretofore discussed and the
ourt held that neither contribution *or indemnity*
s recoverable "where the ship owner joined in the
wrong doing in supplying a defective appliance to
ne employee's stevedore."

This Opinion was quoted with approval by Judge
enman in the *States S. S. Co. v. Rothschild* case
05 F. 2d 253 where he said:

"However, the opinion of the Supreme Court
speaks only of contribution as between joint tort
feasors. Here we do not have joint tort feaors,
but rather one party who is alleged to be solely
at fault and another party who is alleged to be
liable without fault as a result of the others
acts. In *American Mut. Liability Ins. Co. v.*
Mathews, 182 F. 2d 332, at page 234, the ship
owner joined in the wrong doing in supplying
a defective appliance to the employee's stevedore.
The holding is that an owner so acting cannot
recover. The Court's reasoning clearly warrants
the inference that if the ship owner had been
free of wrong doing, the quasi contractual obli-
gation not to cause liability in the ship owner
would exist.

Furthermore, the Halcyon and the instant case
are distinguishable upon their facts. Halcyon
was an attempt by a ship owner to bring a ship
repair company in as a third party defendant
in an action by an employee of the latter against
the former on the ground that the ship repair
company's negligence had contributed to the in-
juries of its employee. Here, the libellant (ap-
pellant) alleged that it was not at fault, that

it was liable only because of its non delegable duty to furnish a stevedore a seaworthy ship and a safe place within which to work under the doctrine of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, a species of absolute liability regardless of fault."

The Court then goes on to liken the absolute duty of a ship owner to provide safe places for longshoremen to work as to the absolute duty of a land owner to keep his premises in a safe condition, and cites the case of *Gray v. Boston Gas Light Co.*, 114 Mass. 149 wherein it was held that where the city grants permission to a third person to excavate the streets, that the city would be liable for its failure to inspect the streets but might recover over from a third person *if it was not itself actively negligent in creating the unsafe condition.*

Again the Court states in its opinion in part as follows:

"Here it was clearly foreseeable that if the stevedore company made the ship unseaworthy, causing injury to a stevedore employee, the owner would be liable to the employee for the full amount of his injury under the case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85."

Again the Court in quoting from the Restatement of Restitution says:

"The Restatement of Restitution §76 states the general rule thusly: 'a person who, in whole or in part, has discharged a duty which is owed by him which as between himself and another should have been discharged by the other, is

entitled to indemnity from the other, *unless the payor is barred by the wrongful nature of his conduct.*”

It is, therefore, obvious that in the Rothschild case that the facts which are not set forth in the opinion, must have revealed the *lack of fault* on the part of the ship owner and likewise, a lack of *joining in the wrongful supplying of a defective appliance*, and further that the ship owner was not a party in the relative tort which was committed. Again it is clear from the opinion in the Rothschild case that the Court was considering a factual situation wherein the stevedore company *made the ship unseaworthy*.

Union Sulphur and Oil Corporation v. Jones & Son, 195 F. 2d 93 (C.A. 9, 1952) clearly supports the findings and conclusions of the trial court.

Because of the lack of any understandable statement of facts in the opinion, it is necessary to look to the Apostles on Appeal to find the facts so that the decision may be properly evaluated. The findings of fact reveal the following. The libellant was an employee of the stevedoring company, Jones & Son. The ship of the claimant was being unloaded under stevedoring contract with Jones. The libellant was descending a steel ladder permanently fastened to the after portion of number three hatch when one of the rungs of the ladder, unseaworthy at the time of the accident, gave way and precipitated the libellant into the hold causing severe injuries. We quote from a portion of the findings of fact of the trial judge which include the following:

“The Court finds that the weld by which the steel run was welded to the vertical uprights of the ladder was defective. However, prior to the day of the accident the weld, although defective, had supported many men who had used the ladder for climbing in and out of the hold, and the Court finds that at the time the vessel was turned over to the stevedore company for the purpose of discharging the cargo the weld was sufficiently strong to support men heavier than libelant climbing up and down and using the ladder, and that the ladder could have been used by men climbing up and down it, and the accident would not have occurred except for a further weakening of the ladder caused by the impleaded respondent as hereinafter set forth. The court finds that prior to the accident the impleaded respondent stevedore company, in connection with the discharging of the sulphur, had used a clam-shell bucket and had also used a drag to drag the sulphur from the wings and trunks of the hatch into the square of the hatch and had used wire cables known as drag lines for the purpose of pulling the drag into the square of the hatch, and had also used drag lines and blocks for the purpose of obtaining favorable leads to the drag. The Court finds that the impleaded respondent stevedore company had, prior to the accident, used the ladder for obtaining leads to its drag lines. This placed heavy and excessive strains upon the ladder at and near the point where the rung gave way and also caused it to shake and vibrate excessively and caused the ladder to be further weakened and loosened at said point. The ladder, which was part of the permanent structure of the ves-

sel, was not designed or intended to be subjected the heavy and excessive strains which were placed upon it by impleaded respondent stevedore company. It was not good stevedoring practice for the stevedore company to use the ladder for this purpose and to subject it to heavy and excessive strain and vibration by means of its drag lines.

The court finds that the accident and libelant's injuries were proximately caused by the defective weld by which the rung was welded to the uprights of the ladder, combined with the further weakening and loosening of the rung resulting from the stevedore company's improper use of the ladder. The court finds that the vessel was unseaworthy in that the weld of the rung to the uprights of the ladder was defective, but that this unseaworthiness would not itself have caused the accident except for the joint and concurring negligence of the impleaded respondent stevedore company in causing the rung to be further weakened and loosened.

The court finds that libelant's injuries were proximately caused by the joint and concurring negligence of the vessel Herman Frasch and of the impleaded respondent, W. J. Jones & Son, Inc."

(Findings, Paragraphs IV, V, VI, and VII.)

There are no findings with reference to negligence at the part of the claimant excepting as hereinabove set forth.

The conclusions of law deduced by the trial judge are as follows:

"1. The respondent vessel Herman Frasch was liable to libelant for the full amount of his damages.

2. The amount paid by claimant and petitioner Union Sulphur and Oil Corporation to libelant in full settlement of libelant's claim was not in excess of a reasonable amount for the libelant's damages.

3. Libelant's injuries proximately resulted from the joint and concurring negligence of the ship (and its owners, claimant and petitioner) and the impleaded respondent, W. J. Jones & Son, Inc.

4. Although libelant's injuries were proximately caused by the joint and concurring negligence of the ship and the impleaded respondent, claimant and petitioner's demand for indemnity or contribution over and against the impleaded respondent should be denied upon authority of *American Mut. Liability Ins. Co. v. Mathews*, 182 F. 2d 332, 2 Cir. and in conformity with *Johnson v. U. S.* 79 F. Supp. 448 (1948).

5. The claims of the libelant have already been fully discharged and satisfied by claimant and petitioner through payment of \$6110.00 in compromise settlement. The impleaded respondent W. J. Jones & Sons, Inc., is entitled to a decree dismissing the claim of claimant and petitioner for contribution or indemnity, and the impleading petition should be dismissed with prejudice and without costs to any of the parties."

The apostles on appeal do not contain the evidence which was introduced in the trial Court. They contain a pre-trial order, the findings of fact, conclusions of law and the decree. Therefore, the United States Court of Appeals did not have the testimony of the witnesses before it on the appeal. Its reference to the "facts proven" must refer to the findings of fact

and the admissions contained in the pre-trial order. With this in mind, what the Court said is quite important:

“We agree with the District Court that upon the facts proven the court properly found that the negligence of Union Sulphur and Jones, Inc., jointly caused the injury to Marshall. Hence, our decision in the Rothschild case is not applicable.”

It, therefore, appears quite obvious from the findings of fact that the injuries to the injured stevedore were proximately caused by the defective weld with which the rung was welded to the uprights of the ladder, combined with the further weakening and loosening of the rung resulting from the stevedore company's improper use of the ladder and further that the vessel was unseaworthy in that the weld of the rung to the uprights of the ladder was defective, but that this unseaworthiness would not of itself have caused the accident except for the joint and concurring negligence of the stevedore company in causing the rung to be further weakened and loosened. This appears to be the most important finding in the record. Therefore, it is obvious that the owner in the *Union Sulphur* case did *nothing* whatever with reference to the ladder from the time the work started until the time of the accident. Therefore, it might be said that its attitude throughout was *passive*. It did, however, furnish a vessel for the doing of the work which was equipped with a defectively welded rung of a ladder. There was not even anything in the record (unlike the case at bar) which suggests that the

ship owner had any actual knowledge of the defective weld at any time before the accident happened. If there is a finding of negligence on the part of the ship owner contained in the findings of fact it can be based only upon the ground that the ship owner by the exercise of ordinary care *could* have ascertained that the weld was defective, or that the *act* of furnishing a ladder with a defective weld was *active* negligence. The latter would seem to be the construction placed upon the findings of fact by the Ninth Circuit because it specifically refers to the case of *American Mut. Liability Ins. Co. v. Mathews*, 2 Cir., 182 F. 2d 332, upon which the trial judge relied and which in effect is cited with approval by our Circuit Court of Appeals.

Was One Wrong Completed and a New Supervening Cause Added?

The rule of "intervening force" discussed by appellant in its brief (pp. 32-35) is not applicable to the facts of the instant case. While it is true as stated in the Restatement of Torts, Sec. 441 (Appellant's Brief p. 32) an intervening force may turn a harmless situation into an injurious force. Nevertheless, such intervening force may, or may not, be a superseding cause and the absence of locking devices was not a "harmless situation". If it is a "contributory factor" in producing harm then both parties are concurrently liable. The rule is well expressed in Restatement of Torts Sec. 441(d) as follows:

"The active operation of an intervening force may, or may not, be a superseding cause which relieves the actor from liability for another's

harm occurring thereafter. Whether it has this effect is determined by the rules stated in § 442-453. A force due to an act of a third person which is wrongful towards the other who is harmed may be a contributory factor in producing the harm. If so, both the actor and the third person are concurrently liable. This is so, although the actor's conduct has ceased to operate actively and has merely created a condition which is made harmful by the operations of the intervening force set in motion by a third person's negligent or otherwise wrongful conduct. However, while there is concurrent liability, the two forces are not concurrent causes as that term is customarily used. To be a concurrent cause, the effects of the negligent conduct of both the actor and the third person must be in active and substantially simultaneous operation. (Sec. § 439)."

Sec. 439(Restatement Torts) states the rule as follows:

"If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operations on the effects of a third person innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor for liability.

Comment:

(a) Although in the great majority of cases to which the rule stated in this Section is applicable, the effects of the conduct of both the actor and the third person are in simultaneous active operations, it is not necessary that their operation be absolutely simultaneous. It is enough that the two are in substantially simultaneous operations,

as when the effect of the conduct of one or the other has ceased its active operation immediately before the other's conduct takes active effect in harm to another."

Section 452 (*Restatement of Torts*) Third Person's Failure to Prevent Harm, states the rule as follows:

"Failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the others harm."

The Restatement of Torts on the question of causation contains 32 sections and consumes sixty-nine pages. One may not pick out an isolated statement to prove a rule.

Section 442 of the Restatement lays down six "important" considerations or tests to be applied in determining whether an intervening force is a superseding cause all of which means that the findings of the trial Court that there was joint and concurrent negligence is amply sustained under the rules of the Restatement under the facts of the case at bar.

The *California Court in Werkman v. Howard Zink Corp., et al.*, 218 Pac. 2d 43, 97 C.A. 2d 418 held the owner of a building who had negligently constructed an overhead garage door so that it would extend onto an alley-way while closing to be a concurring cause with that of the tenant who closed the door when a pedestrian was walking by causing injuries. Both owner and tenant were held liable.

The *Michigan Court in Brackins v. Olympia*, 316 Mich. 275, N.W. 2d 197 held the owner of a skating

nk jointly and concurrently liable where the injured party was "clipped" by another person, where the rotating rink was uneven.

In *Slattery v. Marra*, 186 F. 2d 134 (2 C.C.A.) Judge Hand stated the rule as follows (p. 136):

"Obviously, the jury was justified in finding that a reasonable person who thought about it at all, would realize that a gang of stevedores who had to open such a door and found it fastened as it was, might well take the chance of using it as it was. *The intervening wrong of a third person is no longer considered a 'breaking the casual chain', or making the first wrong a 'remote', and not a 'proximate' cause, for all those preceding events, without which any later event would not happen are 'causes' "*. (Citing section 449 of the Restatement.) (Added emphasis ours.)

A complete discussion of the rules of causation, proximate cause and intervening cause is found in the case of *Mosley v. Arden Farms Co.*, 26 C. 2d 213, 157 C. 2d 372, where the Supreme Court of California reviews the authorities on this subject and the Restatement and concludes in accord with our position on the matter that an intervening agency does not break the chain of causation where that which occurred was reasonably foreseeable and should have been anticipated.

D. THE CONCLUSIONS OF LAW 1, 2 AND 5.

Specification of Errors Nos. 11, 12, 13, 14 and 15.

The Specification of Errors concern the conclusions of the trial Court that both parties were jointly and concurrently negligent and that (Conclusion of Law

No. 4) the concurring negligence of the ship owner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work.

It is appellant's contention that the (A) evidence does not support the conclusion and (B) that the Conclusion of Law No. 4 is in conflict with Findings of Fact No. 12.

Without again discussing the testimony of the witnesses Bleile (Tr. 289) it should be sufficient to point out that his testimony concerning his conversation with Chief Officer Hogan of the ship concerning the absence of locking devices on the strongbacks is uncontradicted. No one from the vessel President Polk, or any officer, (including Mr. Hogan) appeared to testify to the contrary or to refute the inescapable fact that the ship had knowledge of the absence of the strongback locks prior to the accident.

Finding of Fact No. 12 that plaintiff's negligence "was passive" (Tr. 34) is merely a descriptive phrase which is in no way contrary or inconsistent with the other Findings of Fact and Conclusions of Law. The trial Court made eighteen Findings of Fact and Eight Conclusions of Law and they must be construed as a whole.

We do not believe that there is any inconsistency as the ultimate finding of the trial Court (Conclusion of Law No. 4) is controlling and conclusive on the question, even if it be argued that there was an inconsistency and we again state that there is no inconsistency.

No cases are cited by appellant in support of their contention and we submit that the cases on this point are clearly opposed to their position. The rule is well stated by this court.

In *Winnett v. Helvering* 68 F. (2d) 614 (C.C.A. 9) follows (p. 615):

“We think the rule stated in 24 Cal. Jur. 972, § 205, is a correct statement of the general rule applicable as well in federal courts: § 205. Inconsistency Between Findings of Ultimate Facts and Probative Facts.—as a general rule findings of ultimate facts may not be impeached, controlled, limited or modified by findings of probative facts, but will control in case of any conflict between them. Findings of probative facts invalidate a finding of an ultimate fact only when the latter is based on the former and is entirely overcome thereby and when the findings of probative facts dispose of all the facts involved in the pleadings.”

“Ultimate Facts” are defined in the California case of *New v. Mutual Benefit Health etc. Assn.* 24 Cal. App. (2d) 681 76 Pac. (2d) 131 as follows:

“‘Ultimate Facts’ are the logical conclusions, deduced from certain primary facts, evidentiary in character, and ‘conclusions of law’ are those presumptions or legal deductions which, the facts being given are drawn without further evidence.”

In *Comm. of Int. Rev. v. Sharp* 91 F. (2d) 804 (C.C.A. 3) the Court said:

“‘Evidentiary facts’ must be found from testimony and other evidence, while ‘ultimate facts’ are reasoned conclusions drawn from evidentiary

facts found, *but are likewise fact findings.* (Emphasis ours)

As to the effect of the findings made by the trial Court, the Appellate Courts have held as follows:

In *Rutan v. Johnson & Johnson* 231 F. 369 (C.C.A. 3) it was held that:

“What matters are now subject to review by this court? Certainly we can reverse no finding of fact by the trial court, if the finding was supported by submissible evidence. It is not within our province to weight the evidence, his findings are like the verdict of a jury upon disputed facts, and are similarly conclusive in a court of appeal.”

In accord:

Luckenbach S. S. Co. v. Campbell, 8 F. 2d 223 (C.C.A. 9);

The Hermosa, 57 Fed. (2d) 20 (C.C.A. 9).

VI.

CONCLUSION.

1. The evidence supports the Findings of Fact and Conclusions of Law made by the trial Court that there was joint and concurrent negligence on the part of both parties herein, and that such negligence on the part of Appellant, American President Lines, went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and safe place to work.

2. That the findings and conclusions of the trial Court are based on substantial evidence and appel-

nt has not shown any error or abuse of discretion warranting contrary findings by this Honorable Court.

3. That indemnity should not be awarded to either of the two parties who jointly and concurrently joined in the sequence of events leading to the injury of Mr. Williams, where the contract between the parties contained no indemnity agreement.

4. That the Findings and Conclusions of Law are supported by the decisions of the various federal and state Courts who have passed on the question of joint and concurrent negligence, when such concurrent negligence was more than a mere liability without fault or negligence.

For the foregoing reasons it is respectfully submitted that the Judgement of the District Court should be affirmed.

Dated, San Francisco, California,

March 26, 1956.

Respectfully submitted,

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No. 14,959

In the
United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellant,

vs.

MARINE TERMINALS CORP., a corporation,

Appellee.

Appellant's Closing Brief

Appeal from the United States District Court for the
Northern District of California, Southern Division

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STATEMENT OF FACTS

The evidence and testimony produced at the trial by each side, as to the facts of the accident was not substantially controverted. Appellee apparently has no real quarrel with appellant's statement of facts. Appellee merely sets forth a condensed version of the evidence eliminating the facts bearing upon its own negligence and adding certain inferences and conclusions which have no place in the statement of facts.

INDEMNITY ALLOWED FOR BREACH OF STEVEDORE'S CONTRACTUAL OBLIGATION TO PERFORM WORK SAFELY

Appellant's Specification of Error No. 1

THE RYAN CASE

(*Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*,
U.S. 100 L.ed (Advance) page 146)

Appellee's reply brief concedes as it must that under the *Ryan* case a breach of contract to perform work safely requires indemnity. We have such a contract in the present case where the duty to perform work properly and to remove hatches and beams was expressly assumed.

Appellee contends, however, the *Ryan* case does not apply because its facts are different. Appellee purports to distinguish the *Ryan* case on several grounds, none of which bear up under analysis:

The fact that the *Ryan* case involves cargo and the present case an item of ship's equipment is of no moment. It is the breach of the stevedore's contractual duty which is the crucial issue. For appellee to continue, knowingly, with its work in the face of a known unsafe condition was clearly a violation of its duty to perform work safely and efficiently. This is equivalent to stevedore's breach of duty in the *Ryan* case to load and unload the vessel properly and safely.

Nor can the *Ryan* case be distinguished on the grounds that it was a case involving "mere unseaworthiness". A careful reading of that case fails to unearth any indication that the court considered whether the Pan-Atlantic vessel was unseaworthy or there was negligence. The longshoreman's suit against the shipowner was tried (and won) on the theory that *either* the vessel was unseaworthy or that shipowner was negligent in failing to furnish a safe place

to work. In the action over for indemnity, the Supreme Court did not identify the nature of the shipowner's liability to the longshoreman. It was not compelled to do so in view of the contractual breach by the stevedore.

Lastly, appellee contends that our interpretation of *Ryan* imposes indemnity irrespective of the participation by the shipowner. This is not true. If *Ryan* means what it says—and we believe it does—the test is whether there has been a breach of the stevedore contract. Indemnity does not follow every accident, but depends upon whether there is a breach of the stevedore's obligation to perform its work properly, efficiently and safely.

It is not correct to assert, as does appellee (Reply Br. p. 11), that *American Mutual Liability Ins. Co. v. Matthews*, 182 F.(2) 322 (2nd Cir. 1950) supplements or alters the rule enunciated in *Ryan*. The *American Mutual* case deals with the right of contribution, not indemnity. In its opinion, it is true the court remarked that there was no implied promise to detect a defect in equipment supplied by the vessel. Here however the stevedore discovered the dangerous condition, yet ignored the dangers created thereby. We do not deal here with a stevedore who had no implied obligation to inspect as in *American Mutual*, but with an express warranty of the stevedore to perform its work properly and efficiently, and to remove beams.

If appellee's contention (Reply Br. p. 12) is that the *Matthews* case requires an express covenant of indemnity to protect the shipowner from its own negligence, it is clear that the *Ryan* case has changed that requirement. We believe that the shift in emphasis by the *Ryan* case to the terms of the stevedore contract and the breach thereof by the stevedore is a substantial change from the cases which preceded it. The Supreme Court language quoted in our opening brief so indicates.

INDEMNITY ALSO ALLOWED WHERE VESSEL UNSEAWORTHY AND STEVEDORE SOLELY NEGLIGENT

Specification of Error No. 2

Even if we disregard the *Ryan* type of contractual indemnity, and look only to the alleged tortious fault of each party, we find here a clear case for indemnity.

Based upon the discovery of the missing latch made by the longshoremen before the accident, we have stipulated the ship was unseaworthy (TR. 168, 256, 257). But this was not a stipulation that the plaintiff knew of the missing latch (TR. 103), nor can it be inferred therefrom that appellant was negligent. There was no evidence to support a finding that appellant was negligent.

There are no less than five references in appellee's reply brief (pp. 2, 10, 12, 13 and 34) to the assertion that the shipowner "knowingly supplied" the defective hatch-beam. There is not one bit of testimony to support this assertion, and it is on this ground alone that appellee attributes negligence to the vessel. The transcript reference cited by appellee for this erroneous conclusion is p. 289. The Chief Officer's words, as testified to by appellee's walking boss were:

"Will you keep your eyes open? I believe I have strongbacks which have no locks."

It is from these words that appellee seeks to show the vessel's knowledge of the defect in the particular beam in question. Appellee has shown, and can show, no other relevant transcript reference. But these words cannot be interpreted to mean more than they say. This is no acknowledgment that No. 2 strongback in the No. 1 lower 'tween deck lacked a locking device. Nothing is stated more than a belief that some beams aboard might have no locks. Appel-

lee recognizes this in its Statement of Facts (Reply Brief p. 2) as follows:

“It is undisputed that the mate of the vessel did not specifically call attention to or point out any particular beams which lacked locking or safety devices.”

Specification of Error No. 3

Appellee asserts that our specification of error No. 3 directed to Finding of Fact No. 8, “is fully answered by the uncontradicted testimony of Mr. Pacquette” discussed on p. 3 of their reply brief. We note that appellee avoids, in this discussion, the point that Pacquette disapproved of having only one section removed (TR. pp. 156-159), and that his normal practice as winch driver (contrary to his practice on the day of the accident) was to leave enough room for the traveling hook, so that no obstruction would be presented to it (TR. 157, 158, 159). Nor has appellee chosen to discuss the action of Pacquette in raising the hook before it was steadied by Williams (TR. 156, 54-5, 83). Based on the foregoing, Finding of Fact No. 8 that Pacquette was free of negligence is not supported by, and is contrary to, the evidence.

Specifications of Errors No. 4 and No. 5

Appellee assiduously avoids, throughout the brief, a discussion of the negligence of its employees. We don’t blame them. The nature and extent of their negligent and reckless conduct is not controverted. The undisputed facts are these: Their tortious conduct consisted of continuing stevedoring operations under a known dangerous condition, after they knew the specific lock was missing from the beam; (TR. 115-116, 117-121, 135) in placing men under the defective beam when they knew the bridle and hook would, in the

normal course of its movement, strike that beam; in failing to stop work until the condition could be corrected or remedied (TR. 178-179); in failing to utilize some ten to fifteen minutes to remove the defective beam as required by the provisions of the Maritime Safety Code, and by the terms of the stevedore contract under which the work was performed (TR. 125, 126, 161, Ex. 16, Ex. 18).

The argument directed to specifications of errors 4 and 5 and elsewhere with relation to the stevedore's negligence is not dependent upon a breach of the Maritime Safety Code. Appellant's suggested finding of fact relating to the breach of the Maritime Safety Code would have more clearly demonstrated the violation by appellee of the standards imposed by the industry for "proper and efficient" conduct of the work which appellee was obliged to perform under the stevedore contract.

Specification of Error No. 6

It is our position that the court erred in not finding that the injuries sustained by the longshoreman resulted from appellant shipowner's breach of its non-delegable duty to furnish the longshoreman a seaworthy ship and from appellee stevedore's sole negligence. Appellee concedes, as it must, that where the sole negligence or primary cause of the accident is attributable to the stevedore, indemnity is allowed (Reply Brief p. 15). Appellee states that the feature of this case taking it out of this accepted rule is the fact that the vessel knowingly supplied defective gear, but there is no evidence to support the argument that the defective beam was knowingly furnished (see p. 4 this brief). Even if it can be argued that the vessel knowingly furnished a hatch beam without locking devices, appellee ignores the effect of *Berti v. Compagnie, etc.*, 213 F.2d 397

(2d Cir. 1954) and *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953), where the stevedore, aware of the defective nature of the ship's equipment failed to take proper precautions.

In the *Crawford* case the shipowner supplied a defective lighting system. The evidence showed that this inadequacy had been known to the ship for forty-eight hours before the accident in which a maritime worker fell in the dark. The court based liability of the shipowner to the employee solely on the ground of unseaworthiness. In the subsequent action for indemnity the court ruled that, with these facts before it, together with the negligence of the employer, the shipowner might well have a cause of action over against the employer.

III.

ALTERNATIVELY NEGLIGENCE OF SHIPOWNER DOES NOT BAR INDEMNITY WHERE STEVEDORE'S NEGLIGENCE ACTIVE AND PRIMARY.

Specifications of Errors Nos. 7, 8 and 9

Negligence of appellant was not proven at the trial but even if appellant was guilty of some negligence, it was of the passive or secondary sort—the negligence of the stevedore was the active primary and proximate cause.

Let us assume, although it is contrary to the evidence, that appellant had specific knowledge relating to the #2 hatch-beam—and further that the Chief Officer called the stevedore's attention to this particular defective beam; that instead of being merely unseaworthiness—it is a case of actual negligence. Even if these facts are assumed indemnity is not foreclosed for such negligence of the shipowner is passive and in view of the undisputed negligent and reckless conduct of the stevedore in continuing with knowledge of the danger, the stevedore's negligence was the active, primary and proximate cause.

Appellant does not really meet the issues raised by this argument, except by reiteration (sometimes in italics) of the lower court's conclusions of law referring to joint and concurring negligence. Reduced to its bare outlines appellee's argument is that there was joint and current negligence because the trial court says there was joint and concurrent negligence. This circular argument is made without any supporting references to the transcript. Such supporting references cannot be furnished because there is no evidence or finding of fact supporting the conclusions of joint and concurrent negligence.

We believe appellant's cases and Law Review article have not been overcome by the arguments on pages 18 through 21 of appellees' reply brief and that our authorities stand up under analysis. These authorities support a claim for indemnity in cases of shipowner's passive negligence as well as cases of unseaworthiness.

IV.

A. PRINCIPLES OF CASES RELIED UPON BY TRIAL COURT

Specification of Error No. 10

Appellee states that the argument in our opening brief (Sec. IV, pp. 35-38) is difficult to follow. The point we made, or tried to make was this: there are numerous cases (discussed in our opening brief pp. 27-35, Sec. III) decided before the *Ryan* case which have generally recognized indemnity in active-passive tort cases when a contractual relationship existed between the tortfeasors. Unlike the *Ryan* case, which specifically refrained from discussion of the comparative faults of the indemnitee and indemnitor, these earlier cases proceeded on the theory that once the contractual relationship was established the fault of each should be considered in comparative terms. These discus-

sions generally were in terms of passive and active negligence and permitted a passive tortfeasor to recover indemnity from the active tortfeasor. In the argument on Specification 10 in our opening brief, we tried to point out that *Halcyon Lines v. Haenn Ship Refitting Corp.*, 342 U.S. 282 (1953) did not alter these principles because *Halcyon* was a case of contribution only; that *American Mutual* did not apply because it was a contribution case with no contractual duty violated and that *States SS Co. v. Rothschild Int. Stev. Co.*, 205 F.2d 253 (9th Cir. 1953) did not apply because there was no contract whatsoever between the shipowner and stevedore.

As we pointed out above there are numerous cases many of which were decided in the Third Circuit holding that once the contractual relationship between the shipowner and stevedore is established indemnity hinges upon shipowner's passive and stevedore's active negligence. Other cases, notably *United States v. Rothschild Int. Stev. Company*, 183 F.2d 181 (9th Cir. 1950), decided the question of indemnity in terms of active and passive negligence without reference to a contractual relationship, although such a contract might have been present. *States SS Co. v. Rothschild*, supra, stands for the proposition that in the absence of contractual relations between the putative indemnitor and indemnitee something more than active or passive negligence must be shown, e.g. the indemnitee must be liable without fault as the result of the sole negligence of the indemnitor. In other words, absent the contractual relation, indemnity is allowed only where the ship is unseaworthy, and the stevedore is solely negligent. But the *States* case expressly distinguished those cases where (1) there is an express contractual indemnity provision or (2) a contract existed between the shipowner and stevedore

from which indemnity can be inferred. Thus the *States* case does not foreclose recovery in indemnity where as here there is a contractual relation and active negligence of the stevedore with passive negligence of the shipowner. Viewed in this light the *States* case together with *Slattery v. Marra Bros.*, 186 F.2d 134 (2nd Cir. 1951) and *American Mutual v. Matthews*, supra, are fully in line with *U. S. v. Arrow Stev. Co.*, 175 F.2d 329 (9th Cir. 1949) and *U. S. v. Rothschild*, supra.

Appellee has set forth a series of cases which, it contends, supports the court below. We believe these cases are distinguishable as follows and, in some instances do not properly set forth the law of indemnity as it is presently applied by the courts.

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). This case stands for the proposition that the shipowner's obligation to provide a seaworthy vessel extends to longshoremen, and this appears to be the only purpose for which it was cited by the court below. The issue of indemnity was not there involved.

Johnson v. U. S., 79 F. Supp 448 (D.C. Ore. 1948). This case involves simply the legal proposition that the Longshoremen's and Harbor Workers' Compensation Act bars a shipowner's suit for *contribution* against the harbor worker's employer. This case merely anticipated the Halcyon case and by no means foreclosed the right to *indemnity* under appropriate circumstances under the *U. S. v. Rothschild* supra and *Ryan* supra cases, which came subsequently.

American Mutual v. Matthews, supra. We dealt with this case at some length in our opening brief (pp. 36-37). We pointed out there that that case involved contribution, not indemnity. The court properly pointed with approval to cases in which indemnity was permitted for breach of a

contractual duty to do the work properly. The court found no breach for failure to discover a defect in the rope. Had the stevedore there discovered the defect, appreciated the danger caused thereby, and yet used the rope, causing an accident, the facts of that case would have been comparable to the factual issues before this court. There is reason to believe that, had the court in *American Mutual* had before it the question of indemnity, and the contractual obligation of the stevedore to perform its work properly, the decision would have been for the shipowner.

Slattery v. Marra Bros. supra. This case has been referred to more than once in support of the trial court's decision, but it is distinguishable because there was no contract of any sort between the two parties. It involved a suit by an employee against Marra for personal injuries resulting from the latter's negligent maintenance of a door on a pier upon which the employee was working. A door adjacent to the work area in which longshoremen were working dropped upon the employee. Marra, lessee of the pier, was sued by the longshoreman employee; Marra in turn filed a third party complaint against the stevedore employer. The facts of the case disclosed that the dangerous condition of the door was not readily apparent to the longshoremen working on the pier. It is important to note that Marra had no contractual relationship with the employer. There the court pointed out that assuming both tortfeasors are liable to the injured person, the difference in the gravity of the faults may throw the entire loss upon one. But since the employer was not liable to his employee under the New Jersey Compensation Act, no such indemnity could be found absent some other legal transaction between them. In our case, the necessary legal transaction has been

supplied—the stevedore contract in force between appellant and appellee (Ex. 16).

Hawn v. Pope & Talbot, Inc., 198 F.2d 800 (3rd Cir. 1952). It is important to note that in this case the court had before it a jury verdict finding both the stevedore and shipowner negligent. The jury did not characterize the negligence of either, so the court concluded that without a finding of secondary or passive negligence on the part of the shipowner and primary negligence on the part of the stevedore, no indemnity could be allowed. Factually also the case is dissimilar to the case here at issue, for the court there noted that the stevedore conducted no activity, and appeared to have no part in the condition which led to the accident. It is important also that in the *Hawn* case there was no contractual relationship between the employer and the shipowner.

Shannon v. U. S., 119 F. Supp. 706 (S.D. N.Y. 1953). There the sole determining factor is a comparison of fault between shipowner and stevedore without any reference to stevedore's contractual relationship. The court in the *Shannon* case merely found no duty on the part of the stevedore to inspect the cable before using it. Contrast the situation here, where the defective beam was discovered by the stevedore and work continued contrary to all safety rules and the contract in the face of the known dangerous condition.

Union Sulphur & Oil Co. v. Jones & Son, 195 F.2d 93 (9th Cir. 1952). Appellee devotes no less than five pages to extended discussion of the *Union Sulphur* case. It is apparent from the facts disclosed (Reply Brief pp. 25-30) that the vessel was unseaworthy by virtue of a defective weld, not apparent to the stevedore upon visual inspection. In the present case, the defect was known to stevedore appellee, commented upon and ignored by appellee, although the

danger created thereby was accurately apprehended. While it was not "good stevedoring practice" to operate the clam shell bucket by drag lines attached to the ladder in the *Union Sulphur* case, it was negligence of the grossest sort to perform stevedoring operations here under the known defective beam. It is noteworthy that the court in *Union Sulphur* in affirming a flat finding of joint and concurrent negligence, nevertheless recognizes that if there had been sole, active, or primary, negligence attributable to the stevedore, indemnity would have been permitted. Thus recovery should be permitted here where the shipowners negligence if any, was only passive (Fdg. No. 12 Tr. 34).

It is our position that in order to find liability of the appellee here, the Court need not go beyond a finding of passive negligence on the part of appellant and primary or active negligence on the part of appellee. This rule is supported in Sec. 97 of the Restatement of Restitution and in the other cases cited in Sec. III on pages 30 and 31 of our opening brief.

8. STEVEDORE'S NEGLIGENCE NOT ONLY ACTIVE—WHICH ALONE PERMITS INDEMNITY, BUT WAS ALSO SUPERVENING

Appellee's question "Was one wrong completed and a new supervening cause added?" has to be answered in the affirmative.

Assuming both parties were negligent, it is not necessary to show that one party's negligence was a superseding cause. To show active or primary negligence is sufficient.

Yet even if the court is obliged to examine the faults of each in terms of superseding cause—which we do not believe it has to do—it will be found that the stevedore's negligence was not only active and primary—it was also superseding.

In our opening brief, we referred to the case of *The Mars*, 9 F.2d 183 (S.D. N.Y. 1914) Judge Learned Hand's comments in that case have relevance to the issues before this court, where he said, at page 184:

"A great deal has been written about reasonable and proximate consequence, and for myself I have never had much enlightenment, except on this which seems to me is the only intelligible line of decision: What would an ordinary man expect, under all the circumstances, to be the result? If something supervenes which nobody would expect and no one had a right to expect, I think the authorities hold, or should be interpreted at least as holding that this is not attributable to the wrongdoer. . . . I agree that the fact that a subsequent piece of carelessness intervenes, does not necessarily remove responsibility from the wrongdoer, but I do think that a man is entitled to suppose that, in loading a barge some examination will be made after so evident and obvious a collision as this. . . ."

Let us re-examine the facts before this Court in light of *The Mars*. A particular beam on the vessel had a missing lock. But this situation was harmless in itself. It became dangerous in the light of stevedoring operations conducted in No. 1 hold. The shipowner, believing that some locks were missing, warned the stevedore to be careful (Tr. 289). It would appear that the shipowner is entitled to at least some reliance upon the contract to perform work properly and on the safety rules under which the longshoremen worked and by which they were required specifically to insure that work would not proceed in the hatches underneath unlocked beams (Tr. 125, 182, 282, 287, Ex. 16). It was shown that a missing lock is immediately evident once the hatch boards adjacent to it are removed. Edward Randolph appellee's employee discovered it immediately (Tr.

3-116) and it was "in fact his business to see that it" was taken off (Tr. 292). Only the longshoremen conducted any activity in this area. No ship's personnel were seen there (Tr. 81, 82, 166, 167, 189). Could the shipowner anticipate that the stevedores having found an obviously defective beam with a lock missing, and with the bridle and hook striking this beam when being hoisted from the hold, would continue to work their men in a lower hold immediately underneath that beam? The failure of the longshoremen to move the beam or to suspend operations in the face of this danger is the crucial factor. They, not the shipowner, met their fate, and the inevitable occurred.

The quotation in appellee's reply brief (p. 30-31) from Section 441(d) of the Restatement of Torts is revealing, for in order to be a concurring cause, "the effects of the negligent conduct of both the actor and the third person must be the result of an active and substantially simultaneous operation". See also *Section 439*. But, as we pointed out above, whatever work had been done by the shipowner was completed before the longshoremen assumed the responsibility for stevedoring operations.

Appellee asserts that the six criteria for superseding cause must be met (Section 442, Restatement of Torts), arguing these criteria were not met because the trial court made a "finding" of joint and concurrent negligence. In the first place, there is no such finding. The phrase appears only as a conclusion of law, and the conclusion of law is in no way supported by evidentiary facts. Appellee is in the wrong position of citing the Restatement to support purported conclusions of law which are not supported either by the findings of fact or by the evidence. Actually, we believe that upon proper analysis, the above section from the

Restatement supports a conclusion of superseding cause.

It may well be that comment c(g) of Section 447 of the Restatement of Torts suggests not only the key to the issue of superseding cause, but an additional basis on which indemnity should be granted in this case.

“While the fact that such an intervening act of a third person is negligent does not prevent the actor’s negligent conduct from being the legal cause of the harm resulting therefrom to another, the negligence of the act may be so great or *the third person’s conduct so reckless* as to make it appear an extraordinary response to the situation created by the actor and therefore a superseding cause of the other’s harm.” (Italics ours.)

The cases cited by the appellee on the issue of superseding cause are not really in substantial discord with the views expressed above, for appellee’s cases cannot really be understood without reference to the factual basis for the court’s conclusions. *Mosley v. Arden Farms*, 26 C.2d 213, 157 P 2d 372 (1945); *Werkman v. Howard Zinc Corp.*, 97 CA 2d 418, 218 P 2d 43 (1950) and *Slattery v. Marra* supra are all distinguishable on the ground that the activities of the second tortfeasor did not involve appreciation of known dangers and the callous disregard of such dangers, inviting disaster. The first two cases and section 452 from the Restatement of Torts do not involve indemnity at all. They involve breach of duty owed to the innocent third party, not the breach of duty owed by the second tortfeasor (in this case, the stevedore) to the original actor (the shipowner). The *Slattery Case* merely forecloses indemnity in the absence of a contractual relationship.

REVIEW OF CONFLICTING FINDINGS OF FACT AND CONCLUSIONS OF LAW

Specifications of Errors Nos. 11, 12, 13, 14 and 15

Appellee devotes a paragraph on page 21 and Section D, pp. 33-36 to the contention that the findings of fact and conclusions of law are supported by the evidence, are consistent, and support the judgment of the trial court.

We should point out that, so far as the issues now before this court are concerned, there is, practically speaking, no dispute of fact. This unique situation occurred primarily because the entire evidence relating to the factual issues of liability comes either from documentary evidence or from testimony of appellee's employees, for they were the only ones present in the area, the only people who could testify to the circumstances surrounding the accident.

Appellee has cited a number of cases dealing with the proposition set forth in Rule 52(a) Federal Rules of Civil Procedure, to the effect that the findings of fact by the trial court will not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. This is the effect of all cases cited on pages 21 and 36 of the appellee's brief. Obviously, in the application of this rule, the courts have hesitated to resolve conflicts of testimony, emphasizing the importance of the trial judge's opportunity to pass on credibility. Even so, however, such findings are never conclusive, and even where there is evidence to support them, they are "clearly erroneous" when, upon review of the entire evidence, the court is left with the definite and firm conviction that a mistake has been made.

Smyth v. Barneson, 181 F.2d 143 (9th Cir. 1950);

Grace Bros. v. Commissioner of Internal Revenue,
173 F.2d 170 (9th Cir. 1949).

And where, as here, the primary or evidentiary facts are not disputed and there is no real conflict in the evidence, the courts' conclusions or inferences drawn from those facts are not subject to the restrictions imposed upon the reviewing court by Rule 52(a), for the reviewing court is in as good a position to make such conclusions or inferences as the trial court.

Stevenot v. Norberg, 210 F.2d 615 (9th Cir. 1954) ;
Home Indemnity Co. of N. Y. v. Standard Accident
Ins. Co., 167 F.2d 919.

Our specifications of errors Nos. 11, 12, 13, 14 and 15 concern erroneous conclusions of the trial court that both parties were jointly and concurrently negligent.

We pointed out first that such conclusions were not supported by the evidence and in fact were contrary to the evidence. To refute this argument, appellee returns, as in other passages of his brief, to page 289 of the transcript. Concurrent negligence on the part of the shipowner is said by appellee to hinge upon a finding that the vessel knowingly supplied an unseaworthy beam (Reply Brief p. 34). No one contends that the Chief Officer said other than what Bleile says he did, but as we have indicated in earlier portions of this brief, there is no support in the evidence for the assertion that the absence of locking devices on No. 2 beam was known to the shipowner. And even if the shipowner did have such knowledge there is no basis for the conclusion that it was jointly or concurrently negligent in light of the stevedore's negligence.

There is yet a further fundamental error in the findings and conclusions. They are clearly contradictory. The court below, in considering the evidence before it, drew inconsistent conclusions and inferences from the unchallenged

acts before it. Finding of Fact No. 12 concludes that appellant's negligence was "passive". Conclusion of Law No. 4 asserts that shipowner's negligence was concurring "and went well beyond a mere passive act of negligence". (Other conclusions are to the same effect.) There was no evidence and no finding to support this conclusion. Appellee suggests that the characterization of appellant's negligence as passive was a mere "descriptive phrase". But however the findings and conclusions are described, it is evident that conflicting inferences and conclusions were drawn from the primary, evidentiary facts.

CONCLUSION

Why should a stevedore company be in a position to shift the financial burden of an accident to a shipowner and avoid payment of compensation and its other obligations, when it has been guilty of deliberate and considered action which it knew would cause injury and damage? Justice and equity as well as the law compel indemnity of a shipowner where a stevedore callously proceeds with work in face of a known and obvious danger in violation of both its express and implied obligations to both the shipowner and its own employees to perform work properly and safely.

The judgment below should be reversed and judgment entered for \$62,500 in favor of appellant and against appellee.

Dated San Francisco, California, April 27, 1956.

Respectfully submitted,

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No. 14,959

United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellant,

vs.

MARINE TERMINALS CORP.,
a corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING
AND ALTERNATIVE MOTION FOR MODIFICATION OF ORDER
TO PERMIT RETRIAL OF NEW ISSUES.

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FILED

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**APPELLEE'S PETITION FOR A REHEARING
AND ALTERNATIVE MOTION FOR MODIFICATION OF ORDER
TO PERMIT RETRIAL OF NEW ISSUES.**

To the Honorable William Healy and Richard H. Chambers, Circuit Judges of the United States Court of Appeals for the Ninth Circuit, and the Honorable Oliver D. Hamlin, District Judge who sat on the Court of Appeals in the Matter:

Comes now the undersigned, your Petitioner and respectfully submits that it has been aggrieved by an opinion of your Honors rendered herein on the 14th day of June, 1956, in the respects hereinafter set forth, and prays for a rehearing of said matter.

GROUND OF THIS PETITION.

A. This Honorable Court erred in applying the ruling of the Supreme Court in the case of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, to the particular facts and pleadings of the case at bar.

B. The doctrine of the *Ryan* case had no applicability to the type of action filed in the case at bar for indemnity based on alleged sole, active and primary negligence on the part of this petitioner.

C. The case at bar was not based on any pleadings of nor under any issues of alleged breach of contract or warranty as was the *Ryan* case.

D. The evidentiary facts, pleadings and issues of the *Ryan* case were entirely foreign and different from the facts, pleadings and issues of the case at bar.

E. That no evidence, findings or consideration had been given or made by the trial judge or counsel on the issues determined in the *Ryan* case on alleged breach of contract or warranties.

F. That justice would require that if the case at bar be determined under the contract provisions and warranties arising out of the contract between the appellant and appellee herein that such issues require supporting pleadings, and that evidence be introduced in a trial on such new issues upon which this Honorable Court has ordered indemnity over.

G. That if the *Ryan* case was applicable to the case at bar that the case should have been remanded to the trial judge for trial on such issues and that this

Honorable Court erred in ordering indemnity over without a trial on such issues.

DISCUSSION OF GROUNDS.

A. PLEADINGS AND ISSUES OF CASE AT BAR.

The indemnity action filed by American President Lines against Marine Terminals Corporation in the case at bar (Tr. p. 3) *were grounded solely on allegations of tortious negligence against the Marine Terminals Corporation* in having its employees “working in a dangerous, unsafe and unseaworthy place due to the imminent danger of said hatchbeams becoming dislodged from its position during cargo handling operations and falling into the hatch” (Tr. p. 4, Par. IV of Complaint.)

It further charged us with “negligently, recklessly and without regard to the imminent peril *to its employees*, commenced cargo operations, etc.” (Tr. p. 4, Par. IV of Complaint.) (Our emphasis.)

Nowhere in the Complaint filed in this action is any alleged breach of contract or warranty as to the method of doing our work under the contract, either alleged or mentioned.

The issues were entirely as to *whose negligence* was the greatest.

The Complaint was based on the theory that the American President Lines’ negligence was mere unseaworthiness (negligence was later interposed) under the doctrine of liability without fault.

All of the issues, evidence and findings were directed to determine the comparative culpability of the parties to the injured stevedore, *and breach of contract or of express or implied warranties were not the subject of either pleadings, evidence, argument, contention or findings by the trial Court.*

The answer of the defendant in the action goes directly to the question of tortious negligence (Tr. p. 19, Paragraph V) and the defense of compliance with the Longshoremen and Harbor Workers Compensation Act is pleaded as a bar as to defendant's "negligence and carelessness". We were not called upon to answer any charge (upon which your Honors have decided this case) as to alleged breach of contract or warranties. The Complaint does not so allege nor were any amendments offered or made to so allege.

Where were we charged at any time in the pleadings or during the trial with having breached our contract or any warranties of performance?

It was not until Appellant filed their opening brief that such contention was first raised, under the *Ryan* case, which we felt and still feel was decided on different facts and pleadings and did not apply to this case.

The trial proceeded on the theory that we were allegedly reckless and negligent and that our conduct was tortious in character. The only violations we were accused of were violations of certain marine safety orders. (Exh. 18.)

B. PLEADINGS AND ISSUES IN THE RYAN CASE.
(BREACH OF CONTRACT AND WARRANTIES.)

We now turn to the decision of the *Ryan* case.
In *Palazzolo v. Pan American SS Corp., et al.*, 111
F. Supp. 505 (D.C.NY) the opinion reveals the following:

“Plaintiff, a longshoreman employed by Ryan Stevedoring Co., Inc., was seriously injured aboard the S.S. Canton Victory when he was struck by a roll of paper pulp during the discharge of the vessel’s cargo at Brooklyn, N. Y. *The theory of plaintiff’s claim was that the cargo of paper pulp was improperly stowed.* The loading of the cargo at Georgetown, S. C., and the discharge of the cargo at Brooklyn, N. Y., were both performed by plaintiff’s employer, Ryan Stevedoring Co., Inc. (hereinafter called Ryan)

...

“It is Pan-Atlantic’s contention that while there can be no contribution between joint tort-feasors ... (citing cases) ... those cases are inapplicable for the reason that Pan-Atlantic was not a joint tort-feasor. Pan-Atlantic argues that liability has been visited upon it *solely because of an improper stowage of cargo* which made the ship unseaworthy *and that since Ryan alone created the unseaworthiness* which is essentially a species of liability without fault; *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 94, 66 S. Ct. 872, 877, 90 L. Ed. 1099, this case comes within the rule of those cases *which imply a contract of indemnity based upon the failure of a party to perform work which it contracted to do.*” (Citing *Burris v. American Chicle*, 2 Cir., 120 F. 2d 218; *Seaboard Stevedoring Corporation v. Sayodohic*

SS Co., 9 Cir., 32 F. 2d 886; *U. S. v. Rochschild International Stevedoring Co.*, 9 Cir., 183 F. 2d 181.)

“In such cases the employer’s or indemnitor’s negligence is described as being the ‘sole’, ‘active’, ‘primary’ or ‘affirmative’ cause of the employee’s injury. However, if the shipowner is a joint tort-feasor a contract of indemnity is not implied for.

“ ‘To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner’s own negligence. In the absence of an express promise, such an implication would be utterly unreasonable’. *American Mut. Liability Ins. Co. v. Matthews*, supra, 182 F. 2d 324.” (Added emphasis ours.)

In the Supreme Court the Court decided the case under the original theory of the action for “breach of contract.” As was said by our Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L. Ed. Adv. 148:

“As permitted by §33 of that act, Palazzolo sued the respondent-ship owner in the Supreme Court of New York. He claimed that the unsafe stowage of the cargo, which caused his injuries, established either the unseaworthiness of the ship, or the shipowner’s negligence in failing to furnish him with a safe place to work, or both.” * * *

(P. 151.) “A like result occurs where a shipowner *sues, for breach of warranty, a supplier of defective ships gear* that has caused injury or death to a longshoreman using it in the course

of his employment. And a like liability for breach of contract accrues to a shipowner against a stevedoring contractor in any instance where the latter's improper stowage causes an injury on shipboard to someone other than one of its own employees. * * *

“The shipowner's action here is not founded upon a tort or upon any duty which the contractor owes to its employee. The third party complaint is grounded upon the contractor's breach of its purely consensual obligations owing to the shipowner to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not bound by the compensation act.

2. The other question is whether, in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused by the contractor's improper stowage of cargo.

*The answer to this is found in the precise ground of the shipowner's action. * * ** On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo. *Such an action brought without reliance upon contractual undertakings, would present the bald question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage should bear the ultimate burden of the injured longshoreman's judgment. That*

question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active and passive tortious conduct. *Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the compensation to such a right.*" (Added emphasis ours.)

The *Ryan* case is, we respectfully state, not authority for the issue of comparison of active versus passive negligence between two alleged joint tortfeasors, as were the issues in the case at bar. In fact, the case at bar was tried upon the very concepts of active versus passive negligence that our Supreme Court well recognizes poses different issues and was a matter entirely and solely elected by the plaintiff when it filed its action.

C. COMPARISON OF PLEADINGS AND ISSUES.

The *Ryan* case.

As pointed out the entire action from its inception in the State Court until its determination in the United States Supreme Court was based on the theory of breach of contract and warranties. Even the action of the injured stevedore, Palazzolo, against the shipowner proceeded on the theory of improper stowage. (See our discussion of the case, *supra*,

where we quote from the first opinion 111 F. Supp. 105.) The ship filed a third party complaint on the theory of breach of contract. In the *Ryan* case no defective beams entirely devoid of locking devices were supplied by the vessel. There is some discussion of chocks and wedges but nothing was at issue as to the failure of the ship knowingly supplying a dangerous piece of equipment, a part of the vessel itself, and then attempting to exculpate itself by comparing its own negligent and tortious conduct with that of the stevedoring contractor as to whose negligent conduct was the more dangerous or was the "sole" "active" proximate cause as compared to "passive negligence".

the case at bar.

The injured stevedore, Williams, in his Complaint filed in the State Court (Tr. pp. 7-12) charged American President Lines with negligence in "carelessly and negligently provided unsafe and improper lashing gear and strongbacks" and that said defendant "so carelessly and negligently failed to provide proper and adequate or other safety devices for securing in place the strongbacks" (Par. IV of Complaint).

A reading of the Complaint will reveal that American President Lines *was sued for tortious negligence as well as unseaworthiness.*

The action brought by American President Lines against Marine Terminals (Tr. 1-12) proceeds *solely* on the theory of negligent and tortious conduct on

the part of Marine Terminals. We quote in part (Par. IV, Tr. 4):

“Plaintiff herein was unaware, not only prior to but at all times mentioned herein and until said hatchbeams became dislodged, as hereinafter set forth, that said safety latch was missing from said hatchbeam, nor did defendant herein at any time prior to said dislodgment advise plaintiff of said dangerous, unsafe, and unseaworthy condition. (*A condition created by the ship itself.*)

Notwithstanding such knowledge on the part of defendant as aforesaid, *defendant negligently, recklessly, and without regard to the imminent peril to its employees*, commenced cargo operations in said hatch. Shortly thereafter said hatchbeam became dislodged when struck by certain cargo handling equipment * * * and fell into said hatch, striking and severely injuring a stevedore employee of defendant, one Robert Williams * * *”

The Complaint also says (Par. V of Complaint, Tr. 5):

“Because of the absolute liability of American * * * to said Robert Williams based on the unseaworthiness* of said hatchbeams as aforesaid said action was compromised and settled * * *” (*The words “and negligence” were added by amendment (Tr. 22)).

And again (Par. VI of Complaint, Tr. 6):

“The sole, active, primary and proximate cause of the injuries sustained by said Robert Williams was the negligent and reckless action of defend-

ant Marine Terminals Corporation in proceeding with cargo operations while fully aware of the fact of the missing safety latch as aforesaid, whereby plaintiff herein has been damaged * * * as to which amount it is entitled to be fully indemnified by defendant."

We respectfully submit that the *Ryan* case does not apply to the pleadings, theory or evidence of the case at bar, for as your Honors well pointed out in your opinion (p. 8)

"The learned trial judge below did not have the benefit of the * * * *Ryan* case, it having been decided subsequently. Hence, the District Court did not proceed on this theory and entered no findings with respect to it."

As your Honors also well said in your opinion in the case at bar (p. 5):

"Thus, it cannot be said that the only liability of American was for unseaworthiness and the questions raised on this appeal will not be decided on this ground."

And again your Honors on the question of the comparison of the negligence as to being passive and secondary as compared to primary active said (pp. 5-6):

"In the instant case the Court below found that 'the plaintiffs negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks.'

Under these reviews it would appear that American's being guilty of passive negligence could recover indemnity because of its active and pri-

mary negligence in permitting the work to continue under the unsafe conditions.

However, if our decision were to be placed upon this ground, there would remain the further question of whether indemnity was barred by the Longshoremen's & Harbor Workers Compensation Act. This question was expressly left open by the Supreme Court in their decision in the *Ryan* case, 350 U.S. 124, 133, 132 fn 6. Therefore, we prefer not to rest our decision upon this ground."

We wish to reiterate that the defense of compliance with the Compensation Act was specially pleaded by Marine Terminals Corporation. (Tr. 18, Par. V of Answer.)

This question is therefore undecided in the case at bar and would remain so in the event this Honorable Court should make such a determination as was apparently meant to be made in your Honors' opinion on page 11 thereof where you say:

"The facts found by the court below are in no way inconsistent with our conclusion that the conduct of Marine in performing its operations under knowingly unsafe conditions was the active and primary negligence which proximately caused the accident."

We respectfully state that such conclusion is inconsistent with the theory of the *Ryan* case and that the cases cited by us in our reply brief and *American Mutual Liability Ins. Co. v. Matthews* (2 CA) 182 Fed. 2d 332 are controlling and were not overruled by our Supreme Court in the *Ryan* case.

We also respectfully urge that your Honors' statement and findings that there was a conflict between the findings of fact and conclusions of law of the trial court (Opinion pp. 10-11) upon which your Honors found that the conclusion of the trial judge (Tr. 13-36):

"4. That the concurring negligence of the shipowner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work"

as in disregard of the rules of interpretation of findings of facts and findings of probative facts as discussed in our brief (p. 34-36) and under the ruling of this Honorable Court in *Winnett v. Helvering*, 68 F.2d 614 (CCA 9).

The effect of failure to plead a cause of action under the existing circumstances has been held to support our attention in the following cases:

Indemnity Ins. Co. of North America v. Moses
(5 CA) 36 F. 2d 219;

Coates v. United States (8 CA) 181 F. 2d 816;

Shultz v. Manufacturers & Traders Trust Co.,
DCNY 40 FS 675 (Affirmed 128 F. 2d 889);

Matt J. Ward Co. v. Goeht (2 CA) 230 F. 879.

See also dissenting opinion in *Ryan* case (supra).

D. IF CASE WAS PROPERLY REVERSED A RETRIAL SHOULD HAVE BEEN ORDERED.

If your Honors should still feel that the contract and warranty thereof was properly an issue in the case at bar, we most respectfully state that a trial,

determinations and findings on these issues should be made in a retrial of such issues.

Our Supreme Court in *American Stevedores v. Porello*, 330 U.S. 458, stated as follows:

“From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law. We therefore affirm the decree of the Circuit Court of Appeals as to Porello. We reverse so much of the decree as awards indemnity to the United States under the contract and remand the case to the District Court for determination of the meaning of the contract.”

CONCLUSION.

Accordingly, it is respectfully prayed that a rehearing be granted in the present case for the reasons heretofore stated.

Appellee also respectfully submits that in the alternative and in the event this Honorable Court should reject its contentions in this regard that in all events the mandate of this Court ordering indemnity over should not issue but that the order of this Court should be such as to provide for the admission of

proofs, necessary replendings, and findings on the several issues of fact and law that were not considered, proven, pleaded or considered in the trial of this action.

Dated, San Francisco, California,

July 2, 1956.

Respectfully submitted,

BOYD & TAYLOR,

M. K. TAYLOR,

FREDERIC G. NAVE,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for Appellee and Petitioner in the above-entitled cause and that in my judgment the foregoing Petition and Motion are well founded in point of law as well as in fact and that said Petition for a Rehearing and Alternative Motion are not interposed for delay.

Dated, San Francisco, California,
July 2, 1956.

FREDERIC G. NAVE,
*Of Counsel for Appellee
and Petitioner.*

No. 14960

United States
Court of Appeals
for the Ninth Circuit

WM. P. STUART, Collector of Internal Revenue
for the District of Arizona, Appellant,

vs.

J. E. WILLIS and KING-HOOVER CON-
STRUCTION CO., Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

FEB -8 1956

W. H. EN, CLERK

No. 14960

United States
Court of Appeals
for the Ninth Circuit

L. P. STUART, Collector of Internal Revenue
for the District of Arizona, Appellant,

vs.

E. WILLIS and KING-HOOVER CON-
STRUCTION CO., Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

on. H. BRIAN HOLLAND,
Asst. U. S. Attorney General, Tax Division,
Dept. of Justice, Washington, D. C.,

ACK D. H. HAYS,
United States Attorney,

OBERT S. MURLLESS,
Assistant United States Attorney,

THAN B. STROUD,
Special Assistant to the Attorney General,
Federal Building, Phoenix, Arizona,
Attorneys for Appellant.

NDERSEN AND RAY,
ENNETH C. CHATWIN,
Heard Building, Phoenix, Arizona,
Attorneys for Appellees.

in the District Court of the United States for the
District of Arizona

Civil No. 1828-Phx.

J. E. WILLIS and KING-HOOVER CON-
STRUCTION CO., a Joint Venture,
Plaintiffs,

vs.

WM. P. STUART, Collector, Defendant.

COMPLAINT

And Jury Trial Demand

Comes Now plaintiffs J. E. Willis and King-Hoover Construction Co., an Arizona Corporation, by and through their attorneys H. Verlan Andersen and Oakley J. Ray and for cause of action against Wm. P. Stuart as former Collector of Internal Revenue for the collection district of Arizona and allege:

I.

Plaintiff King-Hoover Construction Co., is an Arizona Corporation, duly organized and existing under the laws of the State of Arizona, and plaintiff J. E. Willis is a citizen and resident of the State and District of Arizona, and the defendant Wm. P. Stuart was at all times mentioned herein the duly appointed and acting Collector of Internal Revenue for the Collection District of Arizona; that plaintiffs were at all times mentioned herein partners in a joint venture organization doing business

as and under the name and style of King-Hoover Construction Co., and J. E. Willis.

II.

That on or about the 6th day of November, 1951, plaintiffs herein became entitled to receive funds in the sum of \$12,278.18 from the United States Government, being the balance due plaintiffs for completion of a Railroad Rehabilitation job, contract number DA-02-002-AVI-30, Navajo Ordnance Depot, Bellmont, Arizona.

III.

That on or about the 6th day of November, 1951, defendant herein, acting in his capacity as Collector of Internal Revenue for the District of Arizona levied an attachment on said sum of \$12,278.18 and applied \$8,667.23 thereof in payment of payroll taxes, which payroll taxes were not the obligation of these plaintiffs as a joint venture organization.

IV.

That the entire amount of said sum of \$8,667.23 constitutes assets in which plaintiff, J. E. Willis, has the sole and exclusive equity and that said J. E. Willis is not either as a partner of King-Hoover Construction Co., or as an individual indebted to the defendant as Collector or to any other Collector for any payroll taxes which are now due and owing.

V.

That plaintiffs duly protested the attachment of

that portion of said funds not applied in payment of obligations of plaintiffs and on the 26th day of December, 1951, plaintiffs duly and seasonably filed with the defendant as Collector of Internal Revenue in the form and manner provided by the Internal Revenue Code and the Regulations provided thereunder, their claim for refund of said sum of \$8,667.23 illegally and unlawfully attached by said defendant and set forth therein in detail their grounds for such claim.

VI.

On or about the 29th day of July, 1952, said Collector of Internal Revenue notified plaintiffs by registered letter that said claim for refund had been disallowed in its entirety.

VII.

That the attachment of the portion of said funds in the sum of \$8,667.23 was illegal and unlawful as foresaid in that the taxes, penalties and interest against which said sum was applied in payment were unlawfully assessed against the plaintiffs herein.

VIII.

By reason whereof defendant owes the plaintiffs the sum of \$8,667.23 plus interest thereon from the 6th day of November, 1951, until paid.

Wherefore plaintiffs pray judgment against the defendant in the sum of \$8,667.23, plus interest thereon at the rate of 6% per annum from the 6th

day of November, 1951, until paid, for costs herein incurred and for all proper relief.

ANDERSEN AND RAY,
/s/ By H. VERLAN ANDERSEN,
Attorneys for Plaintiffs

Jury Trial Demand

To W. P. Stuart, Collector of Internal Revenue,
District of Arizona, Defendant:

You are hereby notified that trial by jury is demanded by plaintiff in the above entitled and numbered cause.

ANDERSEN AND RAY,
/s/ By H. VERLAN ANDERSEN,
Attorneys for Plaintiff

[Endorsed]: Filed December 17, 1952.

[Title of District Court and Cause.]

ANSWER

Now comes the above-named defendant, by his attorney, Edward W. Scruggs, United States Attorney in and for the District of Arizona, and for his answer to the complaint filed herein, alleges and says:

I.

Admits the allegations contained in paragraph I thereof, except it is denied that plaintiffs were at all times mentioned herein partners in a joint ven-

re organization doing business as and under the name and style of King-Hoover Construction Co., and J. E. Willis.

II.

Denies the allegations contained in paragraph II hereof, except it is admitted that on or about the 1st day of November, 1951, King-Hoover Construction Co. herein became entitled to receive funds in the sum of \$12,278.18 from the United States Government, being the balance due it for completion of Railroad Rehabilitation job, contract number A-02-002-AVI-30; Navajo Ordnance Depot, Bellmont, Arizona.

III.

Denies the allegations contained in paragraph III hereof, except it is admitted that on or about the 1st day of November, 1951, defendant herein, acting in his capacity as Collector of Internal Revenue for the District of Arizona levied an attachment on said sum of \$12,278.18 and applied \$8,667.23 thereof in payment of payroll taxes of King-Hoover Construction Co.

IV.

Denies the allegations contained in paragraph IV hereof.

V.

Denies the allegations contained in paragraph V hereof, except it is admitted that plaintiff filed a claim for refund on January 14, 1952.

VI.

Denies the allegations contained in paragraph VI

thereof, except it is admitted that on or about the 29th day of July, 1952, plaintiffs were notified by registered letter that said claim for refund had been disallowed in its entirety.

VII.

Denies the allegations contained in paragraph VII thereof.

VIII.

Denies the allegations contained in paragraph VIII thereof.

Wherefore, defendant prays that the complaint filed herein be dismissed, with costs to be assessed against the plaintiff.

Dated: April 13, 1953.

EDWARD W. SCRUGGS,
United States Attorney,
Attorney for Defendant

/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed April 13, 1953.

[Title of District Court and Cause.]

MOTION FOR ASSOCIATION OF COUNSEL
AND ORDER

Comes Now Oakley J. Ray, one of the attorneys of record for the plaintiff in the above entitled and

numbered cause, and moves the court for an order associating Kenneth C. Chatwin, as counsel for plaintiffs.

Dated: This 29th day of March, 1954.

ANDERSEN AND RAY,
/s/ By OAKLEY J. RAY,
Attorney for Plaintiff

ORDER

Upon motion of Andersen and Ray, attorneys of record for the plaintiff in the above entitled and numbered cause, it is

Ordered that Kenneth C. Chatwin be associated as counsel for plaintiffs.

Dated: This 31 day of March, 1954.

/s/ DAVE W. LING,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed March 31, 1954.

Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, JUNE 18, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for trial this day without a jury. H. Verlan Andersen, Esq. and Kenneth Chatwin, Esq., appear for the plaintiffs and Robert S. Murlless, Esq., Assistant United States

Attorney, appears for the defendant. On motion of Robert S. Murlless, Esq.,

It Is Ordered that Ethan B. Stroud, Esq., is entered as associate counsel for the defendant.

Counsel for the plaintiffs states the plaintiffs' case to the Court.

Counsel for the defendant moves to invoke the Rule. Said motion is granted and all witnesses are excluded from the courtroom excepting J. M. Stanford and Lowell Munsfees.

Counsel for the defendant states the defendant's case to the court.

Plaintiffs' Case:

J. M. Stanford is now duly sworn and cross-examined as an adverse party.

Plaintiffs' exhibit 4, Employers quarterly Federal Tax Returns and Schedule, is admitted in evidence.

Lowell Munsfees is now duly sworn and examined for the plaintiffs.

The following plaintiffs' exhibits are now admitted in evidence: 5, Power of attorney; 1, Agreement; 6, Assignment of claims.

At twelve o'clock noon, It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m.

Subsequently, at 1:30 o'clock p.m., the parties and counsel being present pursuant to recess, the further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Lowell Munsfees, heretofore sworn, is recalled and further examined for the plaintiffs.

The following plaintiffs' exhibits are now ad-

mitted it evidence: 2, Cancelled check; 7, three cancelled checks.

Kent Pomeroy is now duly sworn and examined for the plaintiffs.

The following plaintiffs' exhibits are now admitted in evidence: 3, Claim; 8, Copy of letter of May 22, 1952.

Sam Berger is now duly sworn and examined for the plaintiffs.

Plaintiffs' exhibit 11, Envelope containing Assessment Lists, is admitted in evidence.

The following plaintiffs' witnesses are now duly sworn and examined: William McRae, Claude Hoover.

The plaintiffs rest.

Both sides rest.

It Is Ordered that plaintiffs are allowed 30 days to file opening brief, defendant 30 days thereafter to file reply brief and the plaintiffs 20 days to file closing brief, and that the record show the case will be submitted thereon.

Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, APR. 11, 1955

Honorable Dave W. Ling, United States District Judge, presiding.

This case having been submitted and taken under advisement,

It Is Ordered that the plaintiffs have judgment in accordance with the prayer of their complaint.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME WITH-
IN WHICH TO FILE OBJECTIONS TO
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Now, Defendant moves for an extension of time within which to file objections to proposed findings of fact and conclusions of law, to and including the 9th day of May, 1955.

Dated this 2nd day of May, 1955.

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney,
Attorneys for Defendant

ORDER

Pursuant to the foregoing motion and the files and records in the above entitled and numbered matter, it is

Ordered that defendant have until and including the 9th day of May, 1955, within which to file objections to proposed findings of fact and conclusions of law.

Dated this 2nd day of May, 1955.

/s/ DAVE W. LING,
Judge

[Endorsed]: Filed May 2, 1955.

Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO (PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY PLAINTIFFS

Now defendant, Wm. P. Stuart, objects to the proposed) Findings of Fact and Conclusions of Law submitted by plaintiffs, and filed on or about the 20th day of April, 1955, as follows:

1. Objection is made to proposed Finding of Fact number 1 on the ground that the contract dated November 16, 1950, does not establish a partnership nor a joint venture (Exhibit 1):
2. Objection is made to proposed Finding of Fact number 2 upon the grounds that the purported assignment by the King-Hoover Company, dated June 16, 1951, was insufficient, as a matter of law, and can not be considered as an assignment of the claim against the Collector or the Government, for any purpose:
3. Objection is made to Finding of Fact number 3 upon the grounds that it is an incomplete statement of the facts proved at the trial; objection is made on the further grounds said finding states, as proved, certain facts with respect to which there was no substantial evidence at the trial, defendant urging that there was no substantial evidence of any alleged or wrongful assessment, levy nor application of funds; and in this connection defendant

urges that the following is an essential part of any Findings of Fact upon the subject matter covered by defendant's proposed Finding of Fact number 3:

"That a tax arose on March 10, 1951, upon which date the assessment list was received by the defendant, as Collector of Internal Revenue, Internal Revenue Collection District of Arizona, at Phoenix."

4. Further objection is made to Finding of Fact number 3 upon the grounds that there was no substantial evidence that the payroll taxes were not the obligation of the plaintiff, King-Hoover Company for the reason that there was no evidence that the plaintiffs, nor either of them, were engaged in a joint venture:

5. Objection is made to proposed Finding of Fact number 4 upon the grounds that there was no substantial evidence that the plaintiffs were engaged in a joint venture:

6. Objection is made to proposed Finding of Fact number 5 on the same grounds and for the same reasons that the objection is made to Findings of Fact number 4 above: In this connection, defendant urges that the court should find as a fact:

"J. E. Willis never had any right, title, or interest to or in the contract DA-02-002-AVI-30 which the King-Hoover Company had with the Federal Government at Bellemont, Arizona:"

7. Further objection is made to the proposed

Findings of Fact number 1 through 5 inclusive, above mentioned, upon the grounds and for the reason that there is a failure to state the following as a Finding of Fact, which is first hereinafter quoted, and which the defendant urges is an essential part of any Findings of Fact in the above numbered and entitled matter:

“There was no overpayment of tax to the United States of America, the Internal Revenue Service, by either J. E. Willis or the King-Hoover Construction Company for or in respect to the year 1951.”

8. Defendant objects to each of the proposed conclusions of law upon the grounds and for the reasons that each of them is an improper statement of law insofar as the same may be applied to the above numbered and entitled matter; and for the further reason that each of the statements of law contained in said Conclusions of Law are neither relevant nor applicable to the facts fairly proved at the trial of the above numbered and entitled matter.

Dated this 9th day of May, 1955.

JACK D. H. HAYS,
United States Attorney

/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1955.

In the District Court of the United States in and
for the District of Arizona

Civil Action—No. 1828-Phx.

J. E. WILLIS and KING-HOOVER CON-
STRUCTION COMPANY, a Joint Venture,
Plaintiffs,

vs.

WM. P. STUART, Collector, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

The above entitled cause came on regularly for trial before the court sitting without a jury and the court, having duly considered the evidence in the case and being fully advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

1. That the plaintiffs above named were partners in a joint venture organization doing business as and under the name and style of King-Hoover Construction Company and J. E. Willis, by reasons of the terms of that certain contract in writing dated the 16th day of November, 1950. (P. Exhibit 1).

2. That plaintiff, King - Hoover Construction Company made an assignment of all of its right, title and interest in the proceeds of funds due from the United States Government under contract number DA-02-002-AVI-30 Navajo Ordnance Depot,

Bellmont, Arizona, by assignment dated June 16, 1951 (P. Ex. 6).

3. That the defendant, acting in his capacity as collector of Internal Revenue for the District of Arizona, levied an attachment on the sum of \$12,781.18 due the plaintiffs from the United States Government under contract number DA-02-002-LVI-30 Navajo Ordnance Depot, Bellmont, Arizona; and that out of said sum of the amount of \$8667.23 was applied to payroll taxes which were not the obligation of the plaintiffs as a joint venture.

4. That all obligations of the joint venture to the United States Government were fully paid and discharged.

5. That the sum of \$8667.23 was due plaintiff J. E. Willis under the joint venture agreement and that plaintiff King-Hoover Construction Co., as a member of the joint venture had no right, title, interest or equity in and to said \$8667.23.

6. That the plaintiff, J. E. Willis made proper claim to the Collector of Internal Revenue for refund of the sum of \$8667.23 on the 26th day of December, 1951.

7. That the Collector of Internal Revenue, by notice to plaintiffs by registered letter dated on or about the 29th day of July, 1952, disallowed plaintiff's claim for refund in its entirety.

Conclusions of Law

1. That the agreement in writing executed by the

plaintiffs on the 16th day of November, 1950, admitted as plaintiff's exhibit 1 in evidence created a joint venture between the parties.

2. That the assignment executed by plaintiff King-Hoover Construction Company dated the 16th day of June, 1951, to J. E. Willis, admitted as Plaintiff's Exhibit 6 in evidence, gave the plaintiff J. E. Willis, a lien on the proceeds of that certain contract number DA-02-002-AVI-30 Navajo Ordnance Depot, Bellmont, Arizona, prior and superior to that of the United States Government except for the claim of the United States Government for payroll taxes and other deductions growing out of the performance of said contract in the sum of \$3610.95.

3. That the defendant wrongfully and illegally levied upon the proceeds of said contract due the joint venture and wrongfully and illegally applied the sum of \$8667.23 to obligations of the King-Hoover Construction Co.

4. That the defendant wrongfully refused to grant plaintiff's claim for refund.

JUDGMENT

On the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff J. E. Willis have judgment against the defendant for the principal sum of \$8667.23, together with interest thereon at the rate of 6% per

num from the 6th day of November, 1951, until
aid, and for plaintiff's costs in the sum of \$30.80.

Dated: This 8th day of June, 1955.

/s/ DAVE W. LING,
Judge of the District Court of the United States
for the District of Arizona.

Affidavit of Service by Mail attached.

[Endorsed]: Produced Filed April 20, 1955.

[Endorsed]: Filed June 8, 1955.

Title of District Court and Cause.]

DEFENDANT'S NOTICE OF APPEAL

Notice Is Hereby Given that the defendant,
above-named, hereby appeals to the United States
Court of Appeals for the Ninth Circuit. This ap-
peal is from the judgment of the United States
District Court for the Judicial District of Arizona,
entered on June 8, 1955, in the above entitled
matter.

Dated this 1st day of August, 1955.

JACK D. H. HAYS,
United States Attorney
/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On the ex parte application of defendant, the Court being fully advised,

It Is Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by the defendant by Notice of Appeal filed August 1, 1955, is extended to October 31, 1955, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated this 8th day of September, 1955.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT OF POINTS

The defendant, above-named, appellant, who is perfecting or has perfected this appeal to the United States Court of Appeals for the Ninth Circuit, said appeal being from the judgments of the United States District Court for the District of Arizona, that is (1) order for judgment of April the 11th, 1955, and (2) Judgment signed, entered

and filed on June the 8th, 1955 (Findings of Fact, conclusions and Judgment).

In this regard the defendant intends to rely upon the following points upon this appeal to the United States Court of Appeals for the Ninth Circuit, that is:

1. The trial court erred in holding that it had jurisdiction of this action, since taxpayers' claim for refund was at a variance with the complaint:
2. The trial court erred in holding that a bona fide partnership existed between Willis and the King-Hoover Construction Company:
3. The court erred in holding that the purported assignment of the corporation to Willis did not violate the Assignment of Claims Act:
4. The trial court erred in not holding that the government's tax lien was superior to that of Willis, even if the assignment to Willis be held to be a legal assignment:
5. The court erred in allowing taxpayers interest in the amount of the judgment, by reason that there was no overpayment, but the taxes were allocated to a specific account.

Dated this 1st day of November, 1955.

JACK D. H. HAYS,
United States Attorney

/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in case No. Civ-1828 Phoenix, J. E. Willis and King-Hoover Construction Co., Plaintiffs, vs. Wm. P. Stuart, Collector, Defendant, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of minute entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Plaintiffs' Complaint.
2. Summons.
3. Minute entry of February 12, 1953.

4. Defendant's Answer.
5. Motion and Order associating counsel for plaintiffs.
6. Plaintiffs' Motion to Set.
7. Minute entry of June 18, 1954.
8. Plaintiffs' Opening Brief.
9. Defendant's Brief.
10. Plaintiffs' Reply Brief.
11. Minute entry of April 11, 1955.
12. Plaintiffs' Proposed Findings of Fact and Conclusions of Law (being the same as document No. 15).
13. Motion and Order Extending Time to file objections to proposed findings.
14. Defendant's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law submitted by Plaintiffs.
15. Findings of Fact, Conclusions of Law and Judgment.
16. Notice of Appeal.
17. Order Extending Time for Filing Record and Docketing Appeal.
18. Statement of Points Upon Which Defendant intends to Rely.
19. Designation of Contents of Record on Appeal.
20. Reporter's Transcript of Proceedings.

I further certify that the originals of Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 11 in evidence and 9 and 10 marked for identification are transmitted herewith as a part of this record on appeal.

Witness my hand and the seal of said Court this
2nd day of December, 1955.

/s/ WM. H. LOVELESS,
Clerk

In the District Court of the United States in and
for the District of Arizona

Civil Action No. 1828-Phx.

J. E. WILLIS and KING-HOOVER CON-
STRUCTION COMPANY, a Joint Venture,
Plaintiffs,

vs.

WM. P. STUART, Collector, Defendant.

TRANSCRIPT OF PROCEEDINGS

Proceedings had and evidence taken in the above
entitled cause before the Honorable Dave W. Ling,
Judge of said court, in his court room in the
United States Court House, at Phoenix, Arizona,
commencing on the 18th day of June, A.D. 1954,
at ten o'clock a.m.

Present: Andersen and Chatwin, by Mr. H. Ver-
lan Anderson and Mr. Kenneth C. Chatwin ap-
peared on behalf of Plaintiffs. Mr. Robert S. Murl-
less, Assistant U. S. Attorney, Phoenix, Arizona,
and Mr. Ethan B. Stroud, Special Assistant to the

Attorney General, Washington, D. C., appeared on behalf of Defendant. [1*]

The Clerk: Civil No. 1828 Phoenix. J. E. Willis and King-Hoover Construction Company, a joint venture, versus William P. Stuart, Collector of Internal Revenue, defendant. For trial.

Mr. Andersen: Plaintiff is ready. Mr. Andersen and Mr. Kenneth C. Chatwin for the plaintiff.

Mr. Murlless: If your Honor please, may Mr. then B. Stroud of the Tax Division of the Department of Justice be associated for the purpose of the lawsuit?

The Court: All right, he may be.

Mr. Murlless: And then the defendant is ready.

The Court: You may proceed, gentlemen.

Mr. Andersen: Would your Honor like an opening statement?

The Court: Yes.

Mr. Andersen: This case arises, if the Court please, out of a claimed overpayment made for Federal Social Security and Withholding Taxes.

The plaintiff here, Mr. J. E. Willis, as claimed by the plaintiff, was a joint adventurer with the King-Hoover Construction Company, a corporation, on a particular government job carried on near the city of Flagstaff, Arizona.

The plaintiff intends to prove that an [2] agreement was entered into between this corporation and Mr. Willis, under the terms of which Mr. Willis was

* Page numbers appearing at top of page of original Reporter's transcript of Record.

to advance some \$50,000 in funds, which advance would permit the King-Hoover Construction Company to obtain a bond which was necessary in order for it to qualify as the bidder on that Army job.

We further intend to show, your Honor, that this advance of fifty thousand was made, and that the condition for the advance of the fifty thousand dollars, as expressly stated in the terms of the agreement, was that Mr. J. E. Willis should be secured in this advance by having a prior claim on the proceeds which were to come as payment for the job from the United States Army.

The plaintiff also intends to show, your Honor, that according to this arrangement, the \$50,000 was advanced, the job was duly completed, the funds which were due under the terms of the contract with the Army became due and payable. That Mr. Willis, through his agent, Mr. Lowell Monsees, attempted to get these funds, and before the final payment got into his hands, the funds were taken by the defendant here in payment of payroll taxes and withholding taxes owed by the King-Hoover Construction Company to the Federal Government.

It is our position, your Honor, that these [3] funds were not liable for application of payment of those liabilities.

It is further our position that the plaintiff herein had an equitable lien upon the funds from the moment the contract was entered into, and that this lien was prior in nature to any lien which the Government may have had or attempted to exercise when it took these funds by its levy.

Mr. Stroud: If your Honor please, we would like to invoke the rule at this time.

The Court: All right.

Mr. Stroud: And we have a representative from the Internal Revenue Service with us here, and although he was subpoenaed by the plaintiff, we would like to have him sit to our right as an assistant.

The Court: All right. He will be accepted.

All other witnesses retire from the court room, please. Witnesses excluded.

Mr. Andersen: If the Court please, we have as one of our witnesses Mr. Lowell Monsees, whom we assert is the agent of the plaintiff here, and with the Court's permission, we would like to have him remain.

The Court: All right.

Mr. Stroud: Your Honor, we have also subpoenaed Mr. George Hill, who is one of the officers of the [4] King-Hoover Construction Company. We will not use him until it is our time to be up, and if he could be excused until that time, subject to being available by telephone.

The Court: All right.

Mr. Stroud: If your Honor please, I think that the facts in this case will show that there were two contracts involved.

The first contract was one which the King-Hoover Construction Company itself entered into with an Army Base in Bellmont, Arizona, for the rehabilitation of some railroad depot grounds in Bellmont. I think the evidence will show that the Govern-

ment was the first party, and that the King-Hoover Construction Company alone and by itself was the second party to that contract.

Pursuant to that contract, the evidence will show the King-Hoover Construction Company received some seven payments on that contract, which checks were made to them, to the King-Hoover Construction Company.

The second contract that is involved in this lawsuit, if your Honor please, is a so-called joint venture agreement entered into between the King-Hoover Construction Company, as well as Mr. King and Mr. Hoover, as first parties, and Mr. and Mrs. J. E. Willis as [5] second parties.

Now, we think we will show by the evidence that Mr. and/or Mrs. Willis had no rights under this first contract with the Government, that the money when received by the King-Hoover Construction Company was the King-Hoover Construction Company money, was their property, and being their property, they could do with it what they pleased. We expect to show that.

And it was that money which I think the evidence will show which King-Hoover Construction Company—rather, which the Government levied on, and took, I think it was, some \$11,000. And of that the plaintiffs here claim some \$8600 belonged to one of the joint, alleged so-called joint venturers, Mr. and Mrs. J. E. Willis.

We say that neither Mr. or Mrs. J. E. Willis had an interest. Mr. or Mrs. J. E. Willis had no right, title or interest in that money, that it was the

property of the King-Hoover Construction Company.

And this is a salient fact, if your Honor please, and I think counsel has admitted it in his opening statement, and I think it is an admitted fact, that the King-Hoover Construction Company owed these taxes, and their only contention, as I understand it, their only contention is that this so-called joint venturer or partner, that is, Mr. and Mrs. J. E. Willis, that the money was theirs, and through the [6] joint venture belonged to them.

We say that the tax was owed by the King-Hoover Construction Company, and that it was properly assessed, and we properly collected it.

The plaintiffs, as we understand their allegations, further claim that there was this so-called partnership, or joint venture.

We think the contract, of course, speaks for itself, and that it was a financing agreement, and no doubt the contract, which will be introduced in evidence, will show, among other things, that the \$50,000 was advanced by Mr. Willis on 8 per cent interest, with the possibility if the project was successful, he might get 25 per cent interest on his investment.

At no time was this so-called joint venture or partnership alleged, prior to the time the Government took the money, was it alleged to be a partnership.

In fact, these people held themselves out to all the world, if the Court please, that they were the King-Hoover Construction Company, and the evi-

dence will show that they filed income tax returns showing that they were the King-Hoover Construction Company.

The evidence will show that there was not [7] a Federal income tax co-partnership return filed, that is, by any so-called alleged joint venture or partnership.

The evidence will show there was no capital account standing on the books of the King-Hoover Construction Company showing a partner by the name of J. E. Willis. Mr. Willis had no distributive share in the so-called partnership. He had no right to any money which the partnership made, which the partnership might earn. He received no salary from the so-called partnership.

In fact, his only right was as a creditor for a loan which he advanced, and we submit to the Court that under those facts he was nothing but a creditor, and we came in ahead of him, and the money which we took for the taxes which were owed was rightfully ours.

There are other facts which we will prove to your Honor if we have to prove anything, which will show that this was not any partnership, and we think under the facts and the evidence as it will be adduced here that your Honor should enter judgment for the defendant.

Thank you.

The Court: Call your first witness.

Mr. Andersen: We call Mr. Jack Stanford [8] for cross-examination under the statute, as the agent of the Government.

JACK M. STANFORD

called as an adverse witness by the plaintiffs, for cross-examination, having been first duly sworn, was examined and testified as follows:

Cross-Examination

Q. (By Mr. Andersen): Will you state your name, please? A. Jack M. Stanford.

Q. What were you doing during the years 1950 and 1951, Mr. Stanford?

A. I was employed by the Internal Revenue Service in the District of Arizona.

Q. That is still your job, is it? A. Yes.

Q. What were your duties in connection with this employment?

A. I was a deputy collector. My duties were in minor supervisory capacity over a group of deputy collectors.

Q. Did you work under the direction and supervision of the defendant in this action, Mr. Stuart?

A. I did. [9]

Q. Particularly, Mr. Stanford, was it your duty and obligation to collect income taxes which had been assessed, income and withholding and payroll taxes which had been assessed against various people in this district?

A. Yes, sir, that is right.

Q. What was your authority in connection with this capacity, Mr. Stanford?

A. I don't believe I understand your question, Mr. Andersen.

Q. Would you tell the Court briefly what you

(Testimony of Jack M. Stanford.)

were authorized to do by way of making these collections?

A. I was authorized to collect past due delinquent taxes as evidenced by warranty for distraint, by distraint, seizure, and sale of property, levy upon debts of various types owed to the taxpayer.

Q. Did you have an investigatory duty in connection with that?

A. To the extent of determining what assets or funds there were available upon which distraint could be made.

Q. It is my understanding, Mr. Stanford, that in the performance of your duties as an employee in this capacity, you take upon yourself certain delinquent taxpayers, shall we say, and follow through on those [10] particular ones, is that right?

A. In the capacity that I was in at the particular time that the collection efforts of the then Collector of Internal Revenue were being made on this King-Hoover account, I was in the capacity, as I said, of a minor supervisor.

I was not actually myself charged directly with the collection of those accounts. I acted and worked along with the man that was assigned the document or warrant for distraint.

Q. Can you tell us who that was?

A. They may have changed hands. I think they did.

I think there were two or three different individuals that were actually assigned those accounts at that time.

Testimony of Jack M. Stanford.)

One, I believe, was Mr.—was a deputy collector by the name of Gregory Jimsik; I believe Mr. Sam Berger, and Mr. Horton Yager.

Q. Do you know Mr. Lowell Monsees here?

A. I do.

Q. When did you first meet him?

A. I believe I met Mr. Monsees some time previous to the King-Hoover matter, but just when that was, I am not sure.

I believe I met him when he had a real [11] state office on Monroe Street, between First Avenue and Central Avenue.

Q. But your main association or connection with Mr. Monsees was due to this delinquent account of King-Hoover Construction Company which you mentioned? A. Yes.

Q. Can you tell us when you started to confer with Mr. Monsees about this account, and where it was?

A. I think it must have been sometime during the latter part of 1951. At that time, I called on him at his office on south Central Avenue, just between Jefferson Street.

Q. Could you state what the purpose of your visit there was, Mr. Stanford?

A. This particular visit that I recall in particular was after the claim for refund had been filed by Mr. Monsees, and the purpose of the visit was to ask Mr. Monsees certain questions relative to the claim for refund.

(Testimony of Jack M. Stanford.)

Q. Do you know the date the claim for refund was filed, Mr. Stanford?

A. I don't know offhand, no, sir.

Q. Do you mean to say that you hadn't contacted Mr. Monsees about that account prior to the date the claim for refund was filed? [12]

A. I am sure that we had, yes.

Q. Where was that, Mr. Stanford?

A. I recall at the south Central Avenue address, and I recall, I believe, filing a levy, serving a levy on Mr. Monsees at that address.

Q. Yes. Now, calling your attention to the attachment of this particular amount of money involved in this lawsuit, the \$12,000 and some odd that was attached by the Collector.

Prior to the time that this money became due and owing, did you discuss this particular amount or sum with Mr. Monsees?

A. I don't believe that I did. I am not sure of that, though.

Q. Isn't it true, Mr. Stanford, that you talked to Mr. Monsees in the office of Mr. McRae of the Collector's office?

A. I think that is probably true. I have a memory of Mr. Monsees being in our office in connection with this matter.

Q. And would you say that was prior in time to the date that this money was attached by the Government?

A. I couldn't say, Mr. Andersen. It possibly was. I don't believe so, though.

(Testimony of Jack M. Stanford.)

I think our file definitely reflects that [13] we, shortly after becoming aware of this fund owing, that we served a levy and I have no positive memory of having talked to Mr. Monsees prior to the service of the levy.

Q. You mentioned a moment ago, Mr. Stanford, that you had gone down to Mr. Monsees's office, and that you had spoken to him there you thought sometime before this levy was made.

Were you down there for the purpose of finding out what assets were owned by King-Hoover Construction Company?

A. First, I don't believe, Mr. Andersen, that I said prior to the date the levy was made——

Q. You aren't certain about that?

A. I said prior to the date the claim was filed, possibly.

Q. To I understand your testimony to be now, Mr. Stanford, that you hadn't discussed this particular sum of money that was to become due with Mr. Monsees prior to the date that it did become due?

A. My memory of the thing, Mr. Andersen, is that I don't believe that I was aware that Mr. Monsees was in any way connected with our taxpayer, King-Hoover Construction Company, until we had filed this first levy on the funds. [14]

I am referring to the levy which was paid now, the first one.

Q. You are not certain about that, though?

A. Well, that is my best memory on it. It happened some time ago, and I felt, in thinking back

(Testimony of Jack M. Stanford.)

over this, I have always taken—my thoughts have always been that the first indication of Mr. Monsees' interest in the matter was after we had filed the first levy.

Q. Do you know the amount of this first levy?

A. It was something over \$11,000.

Q. Could it have been over twelve thousand?

A. Yes.

Q. Was it not in fact \$12,278.18?

A. That is right, I believe.

Q. And can you say when that levy was made?

A. I believe it was made about August 20th, 1951, or shortly thereafter.

Q. Do you know when the funds actually were obtained by the Collector's office?

A. I can't state the date definitely. It was sometime—I believe there was quite a delay. I would say offhand that it must have been sometime in October, 1951.

Q. Could it have been November 6th, 1951?

A. It could have been, yes. [15]

Q. And so when you made this levy, between that date, which you state was, to the best of your recollection, in August, between that date and the date the funds were actually obtained, you did have discussion with Mr. Monsees, did you?

A. I believe that would be right. Surely sometime between that date, Mr. Monsees—I became aware that Mr. Monsees had an interest.

Q. Did you know what Mr. Monsees' interest was?

Testimony of Jack M. Stanford.)

Mr. Stroud: Your Honor, we object to that question. We object to any interests Mr. Monsees may have had, and ask that that be stricken from the record. I don't think it is proper for counsel to prove agency by this gentleman here, if that is what he is attempting to do.

Mr. Andersen: This isn't our object, to prove agency here, especially. We are trying to get from this witness his information about this subject at this particular time. I think it is thoroughly competent.

The Court: Go ahead.

Mr. Andersen: Read the question please.

(The pending question was read by the Reporter.)

A. (By The Witness): I think he explained to me what he claimed his [16] interest was, yes.

Q. (By Mr. Andersen): Could you tell the court what that was?

Mr. Stroud: Same objection, if your Honor please. It would be hearsay, not properly connected up as yet. No agency of any type, or interest.

The Court: They probably will later.

Mr. Andersen: We will, your Honor.

A. (By The Witness): My memory is that Mr. Monsees alleged that the person whom he was representing, Mr. Willis, had advanced funds on this particular Government contract, against which we had levied, and that he was entitled to be paid before the Government, that Mr. Willis was entitled to be paid before the Government's levy was on.

(Testimony of Jack M. Stanford.)

Q. (By Mr. Andersen): Did he give you any other information about this arrangement between Mr. Willis and the construction company?

A. Well, I think probably he did, Mr. Andersen, but offhand I feel we probably discussed the matter, and Mr. Monsees no doubt did furnish some other information, but, in general, that was the main point, as I recall it. [17]

Q. Did he mention anything to you about an assignment which had been made by the construction company to Mr. Willis?

A. He may have. I don't recall for sure.

My impression, or my thinking after whatever discussion I may have had with Mr. Monsees was that this was just a financing arrangement, and that the Government would be entitled to go ahead and levy on the amount.

Mr. Andersen: Would you mark this for identification?

The Clerk: Plaintiffs' Exhibit 1 for identification.

(Said Agreement was marked Plaintiffs' Exhibit Number 1 for identification.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 1 for identification, and ask you if you have ever seen this document before, Mr. Stanford?

A. I can't definitely say whether I have seen it or not, Mr. Andersen.

In explaining that answer, I would like to say that this particular case was more or less, to a point, anyway, a routine matter with us, and I have at-

Testimony of Jack M. Stanford.)

empted to recall in the last few days to memory anything [18] that I may have heard or seen on the matter.

Thinking along the lines of ever having seen a document such as this, I haven't been able to definitely recall whether I did or didn't.

Q. Do you ever remember discussing that particular document either with Mr. McRae or Mr. Monsees? A. No.

Q. You did know, did you not, that Mr. Monsees was not an officer of King-Hoover Construction Company?

A. Yes, I had no knowledge if he was an officer.

Q. But you knew he was acting on behalf of Mr. Willis, did you? A. Yes.

Q. And that the reason he was so acting was because Mr. Willis had placed this \$50,000 into this particular job, is that right?

A. That is right. And my understanding was that he was attorney in fact for Mr. Willis.

Q. Mr. Monsees told you he was worried about getting his money back, didn't he?

A. I think that he indicated that for his client, es.

Q. Did you tell him that you had made this levy upon these funds of \$12,278.00?

A. I can't definitely remember whether I did or not. [19] I feel sure that we must have informed him of that.

Q. Is it not true, Mr. Stanford, that you made an agreement with Mr. Monsees that you would not

(Testimony of Jack M. Stanford.)

bother those funds, but that you would allow them to come into his hands?

A. I don't believe that is right, no, sir. No.

Q. You don't recall any such agreement?

A. No.

Q. Isn't it true that Mr. Monsees told you that he was interested in paying all payroll taxes, withholding taxes due for wages paid on this particular job, and that he would pay those?

A. I don't have any positive memory of his having made such a statement, no.

Q. Didn't you discuss with him the amount of payroll taxes and withholding taxes due on this particular job?

A. We may have. I don't know for sure about that either.

Q. Would that not be part of your responsibility to make inquiry about the payroll taxes on this job?

A. Yes. Whether we made inquiry of Mr. Monsees or not, I don't know. It wouldn't necessarily follow that we would have.

Q. Did you ask Mr. Monsees about what assets King-Hoover [20] Construction Company owned?

A. I have no positive memory of asking him. It could very well be that I did, though.

Q. Wasn't that the object of your visit with Mr. Monsees in his office?

A. I don't recall, Mr. Andersen, that long ago. It was in connection with this whole matter, I am sure, but what specific points these visits covered, I don't recall.

Testimony of Jack M. Stanford.)

Q. Don't you recall asking Mr. Monsees whether or not they were going to make or lose money on this particular job at Flagstaff?

Mr. Stroud: Your Honor, I think the witness has answered. He said he didn't remember. I think it is repetitious.

The Court: Oh, I think so.

Q. (By Mr. Andersen): Did you understand that Mr. Monsees was paying a portion of these payroll taxes?

A. I don't believe I ever had any understanding that Mr. Monsees was paying a portion of them, no.

Mr. Andersen: Mark that for identification, please.

The Clerk: Plaintiffs' Exhibit 2 for identification. [21]

(Said Cancelled Check marked as Plaintiffs' Exhibit 2 for identification.)

Q. (By Mr. Andersen): Do you know, Mr. Stanford, whether or not Mr. Monsees ever sent a check to the Government in payment of these delinquent payroll taxes, or in payment of any payroll taxes in connection with this job at Flagstaff?

A. I am afraid I would have to answer that that just don't have any positive memory on it.

It would be a matter that wouldn't necessarily have stayed in my mind at all, and I just don't remember.

Q. I hand you Plaintiffs' Exhibit 2 for identification, and ask you if you have ever seen that document before?

(Testimony of Jack M. Stanford.)

A. Well, I don't have any positive memory of ever having seen it. It may be that I did see it. I don't know.

Q. Would it be your business to know when any money was received on these accounts on which you were working?

A. Not necessarily, except possibly in a general way.

As I have said, I was acting in a supervisory capacity, and didn't have at all times complete [22] information in regard to the collection of these particular delinquent taxes.

Q. Do you have with you, Mr. Stanford, the information as to when the assessments and demand for payment were made of the King-Hoover Construction Company for payroll taxes for 1951, and for the last quarter of 1950?

A. I, myself, don't have those with me, no, sir. They are records that are not under my jurisdiction or custody.

Q. Does Mr. Berger have that information?

A. I believe that he has, yes.

Q. Do you have the items which were listed on the subpoena duces tecum delivered to you by the Marshal?

A. Most of those items, Mr. Andersen, were not in my custody, so I don't have.

Q. Does Mr. Berger have those items?

A. I don't think Mr. Berger has most of them either.

(testimony of Jack M. Stanford.)
(Handing documents to counsel.) The first listed
ms referring to the claim for refund documents,
e only documents that we would have in our
ce, or that we would have in our office here were
uplicates, possibly, or carbon copies of some of
ese that you have asked for here. I think the
iginals [23] were transmitted to the Internal
venue, Washington, office.

Q. Do you have any of these documents at all
your possession now, or did you bring any of
em with you?

Mr. Stroud: To shorten this up, Mr. Andersen,
hink I have most of those in my possession here.
hat is it specifically you are asking for?

Mr. Andersen: I will tell you.

Mr. Stroud: Your Honor, we are not willing to
stipulate to any of the information stated in the
aim for Refund filed by the plaintiffs.

Counsel just asked if we were willing to stipulate
it. We will not stipulate to it. It is self-serving.

We will stipulate they filed a Claim for Refund.
e answer admits that. And I think they have
ten proper procedural methods to get into the
urt, but we won't stipulate any of the matter in
e Claim for Refund is true or false.

We have the Claim here, if they would like to
e it.

Q. (By Mr. Andersen): Did you ever see the
aim for Refund filed by the King-Hoover Con-
struction Company and Mr. Willis, Mr. [24] Stan-
d?

(Testimony of Jack M. Stanford.)

A. I may have, Mr. Andersen. It was filed so long ago, I couldn't say for sure about that. It would have gone into our office and be processed the same as any other claim.

Q. Would not the claim have come over your desk?

A. Not necessarily, no, sir.

Q. Or any letters in connection with it?

A. No.

Q. Who would have seen this Claim for Refund in your office, and letters connected with it?

A. That would depend, Mr. Andersen, as to how it was sent. If it were mailed to anyone's attention in particular, it would have been, it would have gone to them first, and then under usual procedure, would have been transmitted to our Wage and Excise Branch for processing.

Q. You can't say, then, that you have or have not seen the Claim for Refund?

A. Not definitely, no. The only possibility that I may have seen it was if it were mailed to my attention. Otherwise, ordinarily, I wouldn't have seen it.

Mr. Andersen: May this be marked for identification, please?

The Clerk: Plaintiffs' Exhibit 3 for identification. [25]

(Said Claim referred to was marked as Plaintiffs' Exhibit 3 for identification.)

Mr. Andersen: I think that is all at the present time, your Honor.

Testimony of Jack M. Stanford.)

Mr. Stroud: May I ask a couple questions?

The Court: Yes.

Examination

Q. (By Mr. Stroud): Mr. Stanford, the assessment was made by the Commissioner against King-Hoover Construction Company for the taxes in question, is that right? A. That is right.

Q. There is no doubt but what those taxes were levied by the King-Hoover Construction Company, is that right, sir?

A. I don't think so, no.

Mr. Stroud: That is all.

Further Cross-Examination

Q. (By Mr. Andersen): On what basis were these assessments made? Were they made on the basis of the returns filed by King-Hoover Construction Company?

A. As far as I know, they were on the basis of a voluntary disclosure of the liability. [26]

I think there was one return which was filed and signed under authority of Section 3612 of the Internal Revenue Code by one of our—by myself, I believe, in that case.

Q. Do you have copies of those returns here with you?

A. No, I don't have those either.

Mr. Andersen: Are you willing to stipulate to those?

The Witness: I have the return.

Mr. Andersen: Will you stipulate they were made on that basis?

(Testimony of Jack M. Stanford.)

Q. (By Mr. Andersen): Who else besides Mr. Berger would know about this case, Mr. Stanford?

A. Mr. Yager was concerned in the collection of the account also.

Mr. Andersen: Will you mark this for identification, please?

The Clerk: Plaintiffs' Exhibit 4 for identification.

(Said Employer's Quarterly Federal Tax Returns and Schedules were marked for identification as Plaintiffs' Exhibit Number 4.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 4 [27] for identification, and ask you if you can identify that document?

A. Well, these are returns of social security and withholding taxes filed in the name of King-Hoover Construction Company.

Q. And you made your assessment based upon these returns, didn't you? A. Yes.

Q. Can you tell the Court when demand for payment of this was made?

A. I don't have the records.

Q. You don't have the dates on it?

A. I don't have the records.

Q. Does Mr. Berger have the records on it?

A. Yes, I believe he does.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 4 for identification.

The Court: Do you have any objection?

Mr. Stroud: No objection to Plaintiffs' Exhibit 4, if the Court please.

testimony of Jack M. Stanford.)

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(Said Employer's Quarterly Federal Tax Returns and Schedules were received in evidence and marked as Plaintiffs' Exhibit 4.) [28]

Mr. Andersen: I believe that is all.

Mr. Stroud: No questions.

The Court: That is all.

(Witness excused.)

The Court: We will have our morning recess this time.

(A short recess was had.)

The Court: You may proceed.

Mr. Andersen: I call Mr. Monsees.

LOWELL L. MONSEES

called as a witness in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Andersen): Will you state your name, please?

A. Lowell L. Monsees, M-o-n-s-e-e-s.

Q. Where do you live?

A. 536 West Virginia, Phoenix.

Q. How long have you lived in this area, Mr. Monsees?

A. Since 1936.

Q. What is your present occupation?

A. I am a realtor and investment broker. [29]

Q. Do you know Mr. J. E. Willis?

A. Yes, sir.

(Testimony of Lowell L. Monsees.)

Q. How long have you known him?

A. Since 1949.

Mr. Andersen: May this be marked for identification, please?

The Clerk: Plaintiffs' Exhibit 5 for identification.

(Said Power of Attorney was marked as Plaintiffs' Exhibit 5 for identification.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 5 for identification, and ask you if you recognize that document? A. Yes, sir.

Q. Will you tell the Court what it is?

A. That is a general Power of Attorney given me by Mr. and Mrs. Willis to sign all documents, and do business in their behalf.

Q. In the State of Arizona?

A. In the State of Arizona.

Mr. Andersen: We offer Plaintiffs' Exhibit 5 in evidence.

Mr. Stroud: May I ask this witness a question on voir dire, your Honor?

The Court: You may.

Q. (By Mr. Stroud): Mr. Monsees, did you receive this [30] Power of Attorney in the mail?

A. No, sir.

Q. Where did you, and when did you receive it?

A. Right here in Phoenix over at the First National Bank.

Q. Did you see these people sign their signature here? A. Yes, sir.

Mr. Stroud: We object to the introduction of the

Testimony of Lowell L. Monsees.)

document, your Honor, for the reason we don't believe an agent can prove his agency by himself. We don't believe the document is properly authenticated.

Mr. Andersen: If the Court please, this is the very reason we have this document, is so that Mr. Monsees need not prove the agency by himself.

The Court: All right, it may be received.

The Clerk: Plaintiffs' Exhibit 5 in evidence.

(Said Power of Attorney was received in evidence and marked Plaintiffs' Exhibit Number 5.)

Q. (By Mr. Andersen): Will you state what you as agent for Mr. Willis? What are your general duties? What have they been?

A. I have handled Mr. Willis's investments in the State of Arizona, since prior to this contract, however.

This contract—this Power of Attorney was [31] given me after I had made several transactions for him to his satisfaction, and he wanted me to continue to do business for him while he was out of state.

Therefore, he gave me a general Power of Attorney to buy and sell and transact business for him in his absence.

Q. When did you first contact the offices of King-Hoover Construction Company, or when did they first contact you?

A. Well, our office wrote bonds for the King-Hoover Construction Company prior to the time

(Testimony of Lowell L. Monsees.)

that I was directly interested in this case in this Government job. I knew of their operation.

I was referred—they were referred to me on this particular job through their accountant, who was a neighbor and good friend of mine.

King-Hoover Construction Company had been in operation in this area for a number of years, and being in the real estate and investment business, I knew of their operations for quite some time.

Q. Did you on behalf of Mr. Willis enter into an agreement with the King-Hoover Construction Company? A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit Number 1 for identification, and ask you if you recognize that document? [32] A. Yes, sir.

Q. And will you tell the Court what it is, please?

A. Well, it is an Agreement that was entered into between the King-Hoover Construction Company and Mr. and Mrs. J. E. Willis, a joint venture, to do this particular job.

Q. That is the job at Flagstaff?

A. At Flagstaff, Government job, number so and so. It is a long number here.

Q. Do you know the signatures that are on that document? A. I do.

Q. And did you see Mr. Hoover sign that?

A. Yes, I did.

Q. And Mr. King?

A. Yes, I did, that is right.

Q. And your signature appears there, does it?

estimony of Lowell L. Monsees.)

A. That is right.

Q. And that is your signature?

A. That is.

Mr. Andersen: We offer Plaintiffs' Exhibit 1
for identification in evidence.

Mr. Stroud: No objection.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 1 in evidence. [33]

(Said Agreement referred to was received in
evidence and marked as Plaintiffs' Exhibit 1.)

Q. (By Mr. Andersen): Mr. Monsees, were there
any other agreements about this Flagstaff job be-
tween you, as agent for Mr. Willis, and the King-
Hoover Construction Company, which were not in-
corporated in this Agreement? A. I think not.

Q. That is, this Agreement covered pretty much
the relationship? A. That is right.

Q. Will you just tell the Court what you did in
connection with this Flagstaff job, generally?

A. Well, from the very inception, you mean?

Q. Yes.

A. Well, as I stated a minute ago, I was ap-
proached by the accountant for the King-Hoover
Construction Company. I was informed of this job
that was coming up, that it was going to be a good
job, and that King-Hoover would like to bid on it,
but they didn't have sufficient funds available at
the time to make bond, and that if I was interested
in going into the deal with them, make funds avail-
able so that they could make bond, they would be

(Testimony of Lowell L. Monsees.)

interested in discussing it with us on a joint venture basis. [34]

Discussions proceeded, and we entered into this contract.

I deposited \$50,000 in a joint account, King-Hoover Construction Company and J. E. Willis, in the First National Bank for this particular purpose.

The job proceeded. It was set up in this bank account that I was to sign all checks, approve all bills that were paid, inspect the books, made regular inspection as I saw fit——

Mr. Stroud: Your Honor, if there is some agreement, we object to the witness testifying on that, if there is some other agreement, bank account agreement, I think that would be the best evidence of what it said or contained.

We would also like,—I think we have gotten to a crucial point in the case—we would also like testimony to be in question and answer form, rather than the voluntary statements of the witness, if we may.

The Court: This will probably save time to ask him to state what he did in connection with it.

Q. (By Mr. Andersen): Will you proceed, Mr. Monsees?

A. As the job progressed, I made my regular inspections at the Bellmont Ordnance Base.

I had a pass issued me by the Commanding [35] Colonel that would give me full run of the base where we were working.

(Testimony of Lowell L. Monsees.)

I contacted Mr. Hoover on the job. I contacted Mr. Cuthbert, who was general foreman, and in many cases I had to make decisions in Mr. Hoover's absence, because he was—well, decisions would have to be made. He would ask me what to do about it, and I would tell him what I thought, and that was the way it was done.

During the course of the job, Mr. Hoover got into difficulties on some other work, and because we were invested in the job, I became more active, because I wanted to protect my investment.

In fact, I loaned the company my own personal funds at one time. I transferred the joint account over to my personal account, because the joint account was delinquent—not delinquent, but there was no funds there, so I transferred it over to my own account.

And from July 10th, I believe it was, until the close of the job, I had handled all the funds on the job without any other signature.

I could go further in detail, if you want.

Q. It is your testimony, Mr. Monsees, that the funds involved in this job were all kept separate from any funds of the King-Hoover Construction Company? [36]

A. Yes, sir.

Q. Now, you said something about your having to sign all checks?

A. I did sign. It was set up when the job started. It was set up in the—when I deposited the \$10,000 in the bank, it was established at that time that my signature must appear on all checks.

(Testimony of Lowell L. Monsees.)

Q. Did you deal with the material suppliers who supplied material for these jobs? A. I did.

Q. Could you name some of them?

A. Well, the Arizona Hardware Company in Flagstaff.

Mr. Stroud: Your Honor, we object to the question, "Dealing with".

It calls for a conclusion. It is non-descriptive. We don't know what counsel means by dealing with.

Mr. Andersen: I think, your Honor, the witness can state what he did by way of dealing.

The Court: Did you purchase material from these people?

The Witness: Yes.

Q. (By Mr. Andersen): Did you correspond with these material suppliers?

A. I did. [37]

Q. Would you name one or two others?

A. Well, L. B. Foster was the major supplier of all equipment and supplies on the job.

Arizona Hardware Company, and several sub-contractors I dealt directly with.

Q. Was J. H. Baxter Company of Texas involved in this deal?

A. Yes, sir. They were one of the big suppliers.

Q. Did they contact you for payment of their bills? A. They did.

Q. They sent the bills to your office, did they?

A. Yes, sir.

Q. And all payments of these bills were made out of this bank account that you speak of?

Testimony of Lowell L. Monsees.)

A. That is right.

Q. What arrangements were there made, Mr. Monsees, to secure the repayment of this \$50,000 you as agent for Mr. Willis?

A. Well, we were to get some of the proceeds of the job—our contract called for 25 per cent, the turn of our investment plus 25 per cent of the net profit.

Q. Or eight per cent?

A. Or eight per cent interest on our investment, whichever was greater.

Q. Were all proceeds from this job deposited in this [38] particular bank account?

A. Yes, sir.

Q. That is, with the exception of the last sum of \$12,278.00?

A. Yes, sir, that is correct.

Q. Did these funds come direct from the Army to your office?

A. They come directly from the Army to the King-Hoover Construction Company and my office together. They don't come directly to my office. They come to the King-Hoover Construction Company and my office.

Q. You mean that is the way they were addressed? A. That is right.

Q. How much of this \$50,000 was repaid to you?

A. You mean finally?

Q. Yes. A. \$45,000.

Q. Then there is still five thousand plus your share of the profits due you from this venture?

(Testimony of Lowell L. Monsees.)

A. That is correct, yes, sir.

Q. Do you know whether or not the job made a profit?

A. Yes, sir. The books show they did.

Q. Of approximately how much?

A. As I recall, it was twenty-three, \$24,000.

Q. Of which you claim 25 per cent, is that right? [39]

A. That is right.

Q. You heard the testimony here of Mr. Stanford, Mr. Monsees.

Calling your attention to your dealings with the office of the Collector of Internal Revenue, did you have conversation with these people about the proceeds from this job?

A. Yes, sir.

Q. Can you state when that was and who was present?

A. Well, I had numerous conversations with Mr. Stanford and Mr. Berger.

I don't recall when the first one was on this particular job.

I have known the Internal Revenue Office for quite some time, being a business man, and I have known both of these gentlemen prior to the time that I became interested in this job.

The exact date when I first discussed the King-Hoover job with Mr. Stanford I can't tell you, but I remember discussing it at several times.

Q. Approximately when?

A. I would say it was May or June.

Q. Of 1951?

A. Of 1951.

Q. Could you tell the Court in substance what

Testimony of Lowell L. Monsees.)

These [40] conversations were, as near as you can remember?

A. The first definite recollection I have of discussing this job was when, I can't say that it was after the levy was made, or whether it was about to be made, but it was along about that time.

And we discussed my position with this job, and they were interested, they were primarily interested in getting their money. And I remember definitely telling them that I intended for them to get it, along with all the other creditors getting paid every nickel that was due them on this particular job.

I also told them that I had nothing to do with any of King-Hoover's other obligations or other jobs that they had worked on, or were in trouble on.

I was only interested in the railroad rehabilitation job, and I knew that if the job was completed, there would be sufficient funds to pay all indebtedness, and I was given to understand that the job would be allowed to be completed, and that the funds would be coming through in the normal channels, and that at that time the Internal Revenue Department, along with all other creditors, would be paid off.

Q. Who gave you this understanding, Mr. Monsees?

A. Mr. Stanford and Mr. Berger. [41]

Q. Did they indicate to you that they would not make this last sum of money that became due under the terms of this contract?

A. They did.

(Testimony of Lowell L. Monsees.)

Q. They told you that they would allow it to come through in the regular course?

A. That is correct, yes, sir.

Q. Did you have any conversation about an assignment of these funds from the King-Hoover Construction Company to you?

A. That is correct.

Q. Who did you talk that over with?

A. With the same gentleman, Mr. McRae.

Mr. Stroud: We object to any testimony about any assignment, if your Honor please, unless the document is produced. I think it would be the best evidence.

The Court: I think you have reference to Exhibit 1, don't you? Isn't that what you are talking about, your Exhibit 1?

Mr. Andersen: No. It is another document.

Would you mark this for identification, please?

The Clerk: Plaintiffs' Exhibit 6 for identification.

(Said Assignment of Claims was marked as Plaintiffs' Exhibit Number 6 for identification.) [42]

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 6 for identification, and ask you if you have ever seen that document before?

A. Yes, sir.

Q. What is it?

A. It is an Assignment of Claims under a Government contract.

(Testimony of Lowell L. Monsees.)

Q. Do you recognize the signatures on the second page of that document? A. I do.

Q. Whose are they?

A. C. E. Hoover, President of the King-Hoover Construction Company, and the secretary is George Hill.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 6 for identification.

Q. (By Mr. Andersen): First, was this document delivered to you by George Hill?

A. That is correct.

Q. And it does represent an agreement between you, as agent for Mr. Willis, and the corporation?

A. That is correct.

Mr. Stroud: May I have a question on voir dire, your Honor? [43]

The Court: You may.

Q. (By Mr. Stroud): You say, Mr. Monsees, that this document was delivered to you by Mr. Hill?

A. I was in the room when it was signed.

Q. How was it delivered to you, sir?

A. Handed to me.

Q. Mr. Hill handed it to you?

A. I think that is correct.

Q. Who else was present at the time this was signed besides you and Mr. Hill, and Mr. Hoover?

A. I believe his secretary was. I am not quite clear on that.

Q. Whose secretary, sir?

A. Mr. Hill's secretary.

(Testimony of Lowell L. Monsees.)

Q. Where were you at the time, sir?

A. In Hill's office.

Q. In Mr. Hill's office? A. Yes.

Q. What was the date of the meeting?

A. I don't recall.

Q. Well, was it in 1950, 1951, or 1952?

A. 1951.

Q. It was in 1951? A. Yes. [44]

Q. Did you actually see Mr. Hoover sign this?

A. I am sure I did, yes.

Q. Well, I say, did you see him sign, sir?

A. Yes, I did.

Mr. Stroud: Your Honor, we object to the introduction of the document as being irrelevant and immaterial, and it hasn't been shown yet that they complied with the United States statutes in executing this assignment, and we think until they do prove that feature that the assignment would have no force and effect. It would be illegal.

Mr. Andersen: If the Court please, we are not too particularly concerned about the force or effect of this, except we introduce it for the purpose of showing the arrangement between these two parties.

The Court: Well, it may be received subject to the objection.

The Clerk: Plaintiffs' Exhibit 6 in evidence.

(Said Assignment of Claims referred to was received in evidence and marked as Plaintiffs' Exhibit Number 6.)

Q. (By Mr. Andersen): Did you tell Mr. Stan-

Testimony of Lowell L. Monsees.)

rd and Mr. Berger about this assignment, Mr. Monsees?

A. Yes, sir, I am sure they knew about the assignment. [45]

Q. You discussed it with them, is that right?

A. Yes, sir, that is correct.

Q. And you also discussed the agreement, the original agreement between Mr. Willis and the King-Hoover Construction Company with them, did you? A. Yes, sir.

Q. And did you also discuss it with Mr. McRae?

A. Yes, sir.

Q. You spoke to the Commanding Officer at Bellmont, did you? I think you said, Mr. Monsees?

A. Yes, sir.

Q. Did you tell him your connection with this case? A. Yes, sir.

Mr. Andersen: I believe that is all at this time, your Honor, if we may ask the witness further questions at a later time.

The Court: All right.

Cross Examination

Q. (By Mr. Stroud): Mr. Monsees, who made the bid on the construction contract in Bellmont, Arizona, sir? A. King-Hoover.

Q. Do you know who they made the bid to up there? Do you know who the party was, the person? [46] A. The party to whom——

Q. The bid was made?

A. No, sir, I couldn't tell you the man's name.

(Testimony of Lowell L. Monsees.)

Q. The contract—I believe we issued a subpoena duces tecum on you yesterday.

Do you have that contract with you at this time, sir? A. No, sir, I don't have.

Q. Do you have a copy of the contract with you, or in your home, or anywhere that you can obtain it?

A. No, sir, my attorney, I think—don't you have a copy of that?

Mr. Andersen: You are speaking, are you, Mr. Stroud, of the contract between the Government and the King-Hoover Construction Company?

Mr. Stroud: Yes, sir.

Mr. Andersen: With reference to this Bellmont, job?

Mr. Stroud: Yes, sir.

Mr. Andersen: We haven't been able to find a copy of that contract.

Q. (By Mr. Stroud): Did you ever see that contract, Mr. Monsees? A. Yes, sir.

Q. It was a contract, as I understand it, was it, [47] sir, between the King-Hoover Construction Company and the Government?

A. That is correct.

Q. Who was it on it—who was of the first party of the Government, do you recall?

A. Well, I forget the branch. There was a particular branch of the Government. I don't recall the exact heading now. There are so many of them.

Q. The contract was for the construction of and rehabilitating a railroad in Bellmont, Arizona, is

Testimony of Lowell L. Monsees.)

Is that correct? A. The Ordnance Depot.

Q. And King-Hoover was the construction company that was going to do the work on this contract, is that right?

A. That is correct, at the time the bid was made. If they could have made bond, they would have made it themselves, without us.

Q. The money was advanced by you on behalf of Mr. Willis, I believe you testified, for the financing of this bond, is that correct?

A. That was one purpose of it. It was the money that was used to finance the job.

Q. Did either you or Mr. Willis have anything to do with the construction up there in Bellmont?

A. Yes, sir.

Q. What was that?

A. Well, I answered that. In a supervisory capacity, in some cases. You could call it financing. I spent a lot of time on the job.

Q. What supervisory capacity, to take that up for a moment, did you do, Mr. Monsees?

A. Well, I handled all of the financing of the job. That was my part of the job.

Q. You were only up in Bellmont approximately one month, were you, sir?

A. Well, sometimes I was up there once a week, but I didn't go on regular inspection, unless I was called there on trouble. It was only once a month, that is right.

Q. And Mr. Willis, the person who loaned this money, where did he live? Where is his home?

(Testimony of Lowell L. Monsees.)

A. He has two homes, one in Kankakee, Illinois, and one in Phoenix, Arizona.

Q. To your knowledge, was he ever down here inspecting on the job? Did he ever go to Bellmont, so far as you know?

A. Never went to Bellmont.

Q. And your job was to countersign the checks, as though it were paid out of this fund, is that correct, [49] this \$50,000 fund, along with Mr. Hoover?

A. That was one of my jobs.

Q. What else did you do?

A. Well, I approved all the paying of all bills. I inspected the books.

Q. Well, your connection in paying the bills was only countersigning the checks, wasn't it, Mr. Monsees?

A. I never signed a check until I approved it, and I had to know that it was correct before I signed it.

Q. Who did you rely on for getting that information?

A. Our auditor and bookkeeper.

Q. I see. Now, you didn't attempt to exercise any supervisory capacity up on the job, the actual construction of this rehabilitation job, did you?

A. I was consulted at various times, and particularly any time a major decision had to be made.

Q. What decision do you speak of?

A. Well, for example, extending a contract, or taking on extra work on the job. We had two ex-

estimony of Lowell L. Monsees.)

sions up there that we wouldn't have taken unless I had approved it.

Q. You were involved in that aspect of it because of the money which you were in charge of watching after of Mr. Willis's, is that correct?

A. That was one purpose. [50]

Q. You didn't actually take part in any of the overseeing of the construction of the job, did you, Mr. Monsees?

A. We had a general foreman for the running of the job.

Q. Mr. Hoover, Claude Hoover, of the King-Hoover Construction Company, as well as his foreman, actually did that work, did they not?

A. That is correct.

Q. Now, do you know to whom the checks—do you know how many payments were made on this construction job from time to time?

A. Not right offhand, I couldn't tell you.

Q. Were there some payments made in 1950?

A. I believe there was one come in in 1950. I couldn't swear to that, though.

Q. It was a Government check, was it, or how was the payment made?

A. That is correct, a Government check.

Q. Who was the check made payable to?

A. King-Hoover Construction Company.

Q. What did the King-Hoover Construction Company do with the check when it was received?

A. It was brought to my office and taken over

(Testimony of Lowell L. Monsees.)

A. That is right.

Q. But there was no other indication on the account, or on the checks as signed here that Mr. Willis was connected with the account in any way, was there?

A. Well, when the account was opened, I have a check there, a copy of a check that showed that it was made to the King-Hoover Construction Company and J. E. Willis.

Q. Do you have that with you?

A. Yes, sir.

Q. Would you produce it, please?

Mr. Andersen: Here it is. (Handing document to counsel.)

Q. (By Mr. Stroud): What is this instrument you have [54] handed me, Mr. Monsees?

A. That is a second copy of a voucher check. All checks that I write for Mr. Willis are written on a voucher check system that has three copies, one for my records, one for my bookkeeper, and one goes back to Mr. Willis. This is my copy.

Q. This was to the Valley National Bank in Phoenix?

A. It was written on the Valley National Bank.

Q. And it was for deposit in the First National Bank?

A. To that account, correct.

Q. And that is where the King-Hoover Special Account was kept, wasn't it?

A. Yes, sir.

Q. This shows that a deposit was made to the Special Account in the First National Bank, does it not?

A. That is correct.

testimony of Lowell L. Monsees.)

Q. This does not show the title or the name of the Special Account in the First National Bank building here in Phoenix, does it? A. No.

Q. Now, I ask you if there was any information, exhibits, or affidavits in your possession which showed that the name of this Special Bank Account was anything other than the King-Hoover Construction Company Special [55] Account?

Do you have any instrument of that description in your possession, sir?

A. No, sir, I do not. No money came out of that bank account except my signature was on it.

Q. That is right. You countersigned all the checks that came out of that bank account, along with Mr. Hoover?

A. That is right.

Q. And you checked on the funds that came out of that account, did you not?

A. Yes, sir.

Q. And the reason that you did that was because of this financing that Mr.—the money that Mr. Willis had loaned to the King-Hoover Construction Company? A. Partially, yes.

Q. In other words, you had your hands on the audit, of the money, you had your hand on the purse strings, didn't you, sir?

A. Right, yes, sir.

Q. All right. The so-called joint venture or partnership, of which you say you were agent for Mr. Willis, did not at any time file any Federal income tax co-partnership returns, did they, sir?

(Testimony of Lowell L. Monsees.)

A. Not to my knowledge. I didn't have anything to [56] do with the bookkeeping of this.

Q. There were no such returns filed?

A. No.

Q. You didn't do any of the bookkeeping in connection with this project in Bellmont, Arizona, did you, sir?

A. No, sir.

Q. Who did that, please?

A. Well, sir, they had a bookkeeper by the name of Sterling Page.

Q. You say that that was the King-Hoover Construction Company?

A. That is right.

Q. The King-Hoover Construction Company did all of the accounting and all of the bookkeeping, did they not, Mr. Monsees?

A. Well, they had an outside auditor do the auditing.

Q. They or their auditor did the bookkeeping and the accounting, did they not?

A. Well, I would say he was my auditor as well as theirs, because I paid the bill.

Q. You mean you co-signed the check that paid the bill along with Mr. Hoover?

A. Not entirely. Mr. Willis paid some of it out of [57] his funds.

Q. Mr. Willis paid some of what out of his funds?

A. Some of the auditor's expense.

Q. You mean Mr. Willis loaned this company additional money in addition to the \$50,000 from time to time?

A. Yes.

Q. I see. Now, then, I believe you testified a

Testimony of Lowell L. Monsees.)

moment ago that you made decisions in Mr. Hoover's absence up on the job in Bellmont?

A. Yes.

Q. Do you recall a meeting that you had with Mr. Stanford and Mr. Berger of the Internal Revenue Service, in which they asked you certain questions, and you gave them certain answers which they wrote down, which meeting occurred sometime in 1952, perhaps May of 1952?

A. I had a lot of meetings with those fellows.

Q. Do you remember a particular meeting at which both of those gentlemen were present?

A. Yes.

Q. Do you happen to remember they asked you certain questions, and took certain of your answers down at that time?

A. Well, they always had a scratch pad around when I was around. [58]

Q. In other words, they took down everything you said?

A. Just about. I should have taken more down myself.

Q. Do you recall telling them you had no supervisory capacity whatsoever on the job in Bellmont? Do you recall making that statement to them?

A. I don't recall that.

Q. Could you have made such a statement to them at that time?

A. From a construction standpoint, that is correct. I didn't have anything to do with the actual

(Testimony of Lowell L. Monsees.)

construction work on the job, the supervision of the men on the job, I had no control over.

Q. That was the King-Hoover's responsibility?

A. That is correct, yes, sir.

Q. They did the construction, and completed the job up there, did they not?

A. Yes, sir.

Q. Do you recall telling those agents at that time and on that occasion that you had no active voice in furthering the completion of the job up there in Bellmont?

A. No, sir, I don't.

Q. You don't recall telling them that?

A. No, sir.

Q. Could you have made such a statement to them at [59] that time?

A. Well, if I made it, it was not correct, because I was definitely responsible for getting that job completed, because that was the only way we could get our money back out of the job.

Q. In what way were you responsible for getting the job completed, Mr. Monsees?

Q. By getting the final pay check back in our hands, so we could pay the bill. That was the biggest job I had.

Q. In other words, the co-signing of the checks again?

A. No, I had quite a difficult time keeping those checks that were due on that job coming through. It was, I say, difficult for this reason. The Internal Revenue Department were very hot on King-

(Testimony of Lowell L. Monsees.)

Hoover's trail, trying to collect funds that were due them. I am not questioning that they were due.

Q. That is admitted, is it not, Mr. Monsees, that the tax was actually due?

Mr. Andersen: If you know, Mr. Monsees.

A. (By the Witness): Well, I know that the taxes were paid in full on our job at the time, as the money come through. I think our books will show that the taxes were paid, with [60] the exception of the last payment, and that would have been paid if the final check had come through.

We didn't intend to beat anybody out of a nickel, and everybody was paid in full on this job except Mr. Willis.

Q. (By Mr. Stroud): Do you know that of your own knowledge? Have you checked the books and inspected them? A. Yes, sir.

Q. When did you do that?

A. Well, when the final audit was made.

Q. Who made the final audit?

A. Kent Pomeroy.

Q. You mean the final audit of the King-Hoover Construction job?

A. This railroad rehabilitation job.

Q. Now, then, going back again—I think my question was that you had no active voice in furthering the completion of the job up there, other than the signing of the checks, and I believe you stated you were seeing to it that the funds kept coming through?

(Testimony of Lowell L. Monsees.)

A. Let us put it this way. The job wouldn't have been completed if it hadn't been for me, if that means anything to you.

Q. Would you explain that, sir? [61]

A. Because I had to advance money in addition to what we had originally agreed to advance to get the job completed.

Q. You loaned the King-Hoover Construction Company additional funds of your own?

A. That is correct.

Q. Those were in addition to the funds advanced by Mr. Willis? In other words, how much did you advance to the King-Hoover Construction Company of your own funds?

A. Well, at different times—there was, well, for example, suppose there was a bill come through, and they were going to not make another shipment of supplies unless they had received a check immediately.

They called me long distance. Our King-Hoover bank account was depleted. Our next draw hadn't come through. The only way we could get that material in so we could get another advance was for me to send that man a certified check, so that he would send the supplies, or release them. They would be sitting up here on a spur in Flagstaff paying demurrage, and we couldn't get that material on the job, and get the job done unless the freight bill was paid.

That was one instance, for example, so I paid

(Testimony of Lowell L. Monsees.)

, and when the money come through, I got my money [62] back.

Q. In other words, you made loans to them so that they could make the payments and get the material necessary to complete the job?

A. That is correct. If I was doing nothing but financing on this job, I would have foreclosed them back in May, and done the same thing you are trying to do now.

Q. Did you take any notes on the money you advanced King-Hoover Construction Company?

A. No, I didn't take notes. I didn't have to.

Q. Did Mr. Willis take any notes for the money advanced to the King-Hoover Construction Company?

A. Not except for the first fifty thousand.

Q. He took a promissory note for that amount?

A. Well, the contract itself says a note.

Q. I say, in addition to that, did he take a note for the fifty thousand dollars?

A. No, I don't think so.

Q. I thought your bid included taking a note for that?

A. I said the contract itself was a note.

Q. To your knowledge, was there any notes taken by Willis for the money he advanced?

A. No, not except that contract. [63]

Mr. Andersen: May we have reference to which contract that is, specifically, Mr. Monsees?

The Witness: Well, the original contract.

(Testimony of Lowell L. Monsees.)

Q. (By Mr. Stroud): Was that the contract of 16 November, 1950?

A. I don't recall the date it was signed.

Q. For which Mr. Willis advanced the \$50,000 to finance this project?

A. Yes.

Q. That is the contract you referred to?

A. That is the only time that Mr. Willis advanced him any of his own funds.

Q. And you considered that that contract was Mr. Willis' note for the money he so advanced?

A. That was his security, I will put it that way.

Q. I see. He didn't have any collateral security other than the personal liability of Mr. Hoover and Mr. King, and the King-Hoover Construction Company, is that correct?

A. That is right.

Q. And have any efforts been made by you or by Mr. Willis against Mr. Hoover or Mr. King on this contract?

A. No. We are not concerned about Mr. King and Mr. Hoover. If we get our favorable decision in this case here, there is plenty of funds to pay us off. [64]

Q. Mr. King and Mr. Hoover would be personally liable under the terms of this contract, would they not, sir?

Mr. Andersen: I think, your Honor, he is calling for a legal conclusion that this man isn't capable of answering. The instrument speaks for itself.

The Court: I agree.

Testimony of Lowell L. Monsees.)

Q. (By Mr. Stroud): The King-Hoover Construction Company itself was also liable under the terms of this contract, were they not, for the return of the money advanced by Mr. Willis?

Mr. Andersen: Same objection, your Honor.

The Court: Yes, I think so.

Q. (By Mr. Stroud): And you say, to your knowledge, no effort has been made by either you or Mr. Willis to bring an action or a suit, or to collect any money you may have owing to you from Mr. Hoover or Mr. King, or the King-Hoover Construction Company?

A. We would be very happy to collect money that is due us from any source we can get. I will be frank with you.

Q. Just answer the question.

The Court: You stated a moment ago you hadn't.

The Witness: No, I don't think so. It hasn't been [5] filed, or has there been action filed. Then I am mistaken. I didn't know it had been filed.

Q. (By Mr. Stroud): You didn't consult with Mr. Willis in reference to any of the policies on the job in Bellmont, Arizona, concerning this contract, did you, sir?

A. Mr. Willis, himself?

Q. Yes.

A. The only time Mr. Willis was consulted, he was consulted quite at length, prior to his entering into the contract.

Q. After that he wasn't consulted?

(Testimony of Lowell L. Monsees.)

A. Well, he was kept informed. I kept him posted as the job progressed, yes.

Q. I see. Do you know whether the company had any capital account set up for Mr. or Mrs. Willis on its books of account?

A. I couldn't tell you that.

Q. Did Mr. Willis receive at any time money on this contract as it was completed from time to time?

A. No, sir.

Q. When did he receive his money, Mr. Monsees?

A. I have a schedule in my books when he received money back.

Mr. Andersen: Would you like to have this?

The Witness: Yes.

What was that question again?

Q. (By Mr. Stroud): I said, did Mr. Willis receive any money from time to time on the construction contract?

A. You mean profit, or the original principal?

Q. Just some money.

A. Yes, he received some money.

Q. When did he receive the first amount there?

A. On July 10th.

Q. Of what year?

A. 1951.

Q. And what was that?

A. \$12,800.00.

Q. Was that a return of his principal?

A. Partially.

Q. And when did he receive the next amount?

A. November the 6th, 1951.

Q. And how much was that?

Testimony of Lowell L. Monsees.)

A. Twenty-five thousand.

Q. And when did he receive the next amount?

A. On November 13th.

Q. What was that amount?

A. Fifteen thousand.

Mr. Andersen: If the Court please, if we can
ve [67] time, we will be glad to have this sched-
e from which Mr. Monsees is testifying put in
vidence.

The Witness: In between, however, there was
ore money advanced by me, so that is the balance
et right there.

Q. (By Mr. Stroud): That is summarizing?

A. Yes.

Q. Can you tell us, sir, how much money Mr.
Willis has received back?

A. He has received \$45,000 of the original \$50,-
00 invested.

Q. Of his original \$50,000 loan, he has received
\$5,000 back? A. That is correct.

Q. Do you know how this account was set up
n the books of the King-Hoover-Willis Construc-
on Company?

Mr. Andersen: I think it has been asked and
answered, that he didn't know, your Honor.

The Court: Yes, he didn't know anything
out it.

Q. (By Mr. Stroud): Mr. and/or Mrs. Willis
id not receive any salary from the King-Hoover
onstruction Company?

A. No, sir.

(Testimony of Lowell L. Monsees.)

Q. King - Hoover Construction Company was billed [68] directly, were they not, for bills on the job? A. That is correct.

Q. Under this construction contract?

A. Correct.

The Court: We will suspend until one-thirty.

(Thereupon the noon recess was taken.) [69]

Afternoon Session

June 18, 1954, 1:30 o'clock p.m.

Court convened pursuant to recess.

Appearances: Same as before.

The Court: You may proceed.

LOWELL L. MONSEES

resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Stroud): Now, Mr. Monsees, just before the noon recess we were discussing the return of this principal amount of the loan Mr. Willis had made to the King-Hoover Construction Company, and I believe you had told us he had received back of the \$50,000 some \$45,000, is that correct? A. Exactly forty-five.

Q. And I believe you told us further on August, some date in August of 1951, he received \$12,000, and that you testified further that in November, 1951, he received \$25,000, and then again later in the month of November, 1951, he received \$15,000. [70] Was that substantially what you said, sir?

(Testimony of Lowell L. Monsees.)

A. That is correct.

Q. Now, Mr. Monsees, in adding 12, 25, and 15 thousand dollars, I get \$52,000.

A. Well, that is correct. I grant you that.

Q. In other words, it is correct that Mr. Willis received \$52,000 instead of \$45,000 back?

A. In the interim, though, he had advanced \$41,041.99 on 9/12/51.

And he advanced \$958.01 on 9/17.

He advanced \$2,173.85 on 9/20.

He advanced \$626.12 on 9/22.

And that left a balance as of 9/22 he owed us, well, I would have to subtract here——

Q. That is all right. Let me ask you this, sir. What were these additional loans to the King-Hoover Construction Company made for?

A. For supplies. That was paid direct to the suppliers of material on the job.

Q. Did he take notes for these additional loans that he made to the King-Hoover Construction Company? A. No, sir.

Q. He did not? A. No, sir.

Q. It was just like the original \$50,000 loan? A. [71] just advanced them some more money?

A. The reason he had advanced more money was because we had no money available in the joint account. These bills had to be paid, and to keep the job going, I advanced these funds out of my own account.

Q. Wait a minute. Who advanced these amounts you have just enumerated, you or Mr. Willis?

(Testimony of Lowell L. Monsees.)

A. I did.

Q. You did? A. Yes, sir.

Q. But your records there, and your testimony, as I understand it, sir, showed that Mr. Willis received back \$52,000?

A. Well, that is correct. I grant you that.

Q. Well, then, which is it? Did he receive \$45,000 back, or \$52,000, sir. I don't understand your testimony on that.

A. Well, would you like to look at the record here?

Q. No, I would like to have you tell me which figure is correct. Did he receive back \$45,000 or \$52,000, sir?

A. He received fifty-two, but this total of \$7800.00 that was advanced by me was paid to me by Mr. Willis out of his own funds.

Q. This was out of his own funds, now? [72]

A. I paid them out of my funds.

Q. Whose funds were they, yours, or his?

A. This \$7800 at the time it was spent was my funds, but I got it back from Mr. Willis with his personal check.

Q. Do I understand you to say he loaned the money to you to loan to the corporation?

A. Well, Mr. Willis' funds and mine are—when I handled Mr. Willis' funds, I handled them as my own. He trusts me and I trust him. There is such a thing as trust in this world yet. And that is one man that trusts me, and I trust him.

We commingled our financing, and we always gave

Testimony of Lowell L. Monsees.)

n accounting. However, our books are correct and can be audited at any time.

Q. Then do I understand it that the \$7800 that was advanced to the corporation, in addition to the \$50,000, was all from, all of it came from Mr. Willis to you? A. It did.

Q. Then it wasn't your funds?

A. Well, it was my debt. I advanced it.

Q. Well, did he loan to you this money for your personal purposes?

A. He merely repaid me for moneys that I had spent for his account.

Q. I see. When you recovered the \$7800, did you [73] credit Mr. Willis' account with that amount? A. Yes, sir.

Q. In other words, as I understand it, your funds and his were commingled, and you made additional loans from time to time in addition to the original \$50,000 loan to King-Hoover Construction Company, and as you were repaid yourself, you credited Mr. Willis with that amount, is that correct? Is that a correct statement of it?

A. Our books have always been — our book-keeper keeps our accounts for me. I don't quite follow your statement there, but our books are correct. My books and Mr. Willis' books balance.

We have an unpaid balance from this King-Hoover venture at this time of \$45,000. We have received \$45,000. We have an unpaid balance of \$35,000.

Q. What is the total amount you have loaned

(Testimony of Lowell L. Monsees.)
to the King-Hoover Construction Company, and
by you?

I will specify, what is the total amount which
Mr. Willis has advanced to the King-Hoover Con-
struction Company?

Mr. Andersen: If the Court please, this record
here that Mr. Monsees has in his possession I think
sets forth in detail the dates of these advances and
dates of repayment. [74]

If it please the Court, if we could shorten this
thing, we would be very happy to stipulate that
that go into evidence as the true and correct ac-
count of Mr. Willis with the King-Hoover Con-
struction Company.

The Court: All right.

Q. (By Mr. Stroud): What was the total amount
of money that Mr. Willis advanced to the King-
Hoover Construction Company?

A. I will say it was \$57,800.

Q. And how much money did you advance to
the King-Hoover Construction Company yourself,
personally?

A. Well, that being——

The Court: Is that included?

The Witness: That is included.

The Court: All right, that settles that.

Mr. Stroud: All right.

Q. (By Mr. Stroud): What is the total amount
that Mr. Willis has received back? Is it \$52,000?

A. He has received \$45,000.

Q. I see. And so those figures that show \$12,000,
\$25,000, and \$15,000, are not correct, then?

Testimony of Lowell L. Monsees.)

A. They are correct. If you will follow this larger sheet down here, you will see that they are correct. [75]

Q. Well, then, he has received back more than \$5,000 of the total he has advanced, has he not?

A. I don't follow you.

Q. Do you know how much of the total amount of funds that Mr. Willis advanced to the corporation that he has received back?

A. Yes, sir.

Q. What amount is that? A. \$45,000.

Q. Now, then, Mr. Willis was not a party to the contract with the Government at Bellmont, Arizona, was he, sir?

Mr. Andersen: That has been asked and answered.

The Court: Yes.

Mr. Stroud: I think that has been gone into, your Honor. I wanted to follow that question up with this one.

Q. (By Mr. Stroud): I believe you told the revenue Agents when they talked with you about this matter in May of 1952 that Mr. Willis was not liable in any way, shape, or form under that contract? A. I don't recall that statement.

Q. You don't recall stating that?

A. No, sir. [76]

Q. That is a fact, is it not?

A. I don't know.

Q. You don't know whether he was or was not? He wasn't a party to it, but you don't know whe-

(Testimony of Lowell L. Monsees.)

ther he was or was not liable under the contract?

Mr. Andersen: May we have liable for what, your Honor?

The Court: For the performance of the construction contract, is that what you mean?

Mr. Stroud: I will phrase it this way.

Q. (By Mr. Stroud): Mr. Willis had no obligations or liabilities, or duties under that contract with the Government at Bellmont, Arizona, did he?

A. Well, I am sure he did. Without Mr. Willis, the contract wouldn't have been accepted by the Government, and without Mr. Willis and myself being active in the deal, the job couldn't have been completed, so I would say he had a definite responsibility there.

Q. Did the Government know that either you or Mr. Willis was involved in this matter?

A. The Commanding Officer up at Bellmont knew it.

Q. What duties did you or Mr. Willis have under that contract?

A. We furnished the financing and paid the bills and [77] saw that the job was completed.

Q. I understand that. But did you have any liability under that contract for the completion of it?

Mr. Chatwin: That calls for a conclusion. I object to it.

Mr. Stroud: We are perfectly willing if counsel, or if the plaintiffs will produce the contract, to let it speak for itself, and to introduce it into

estimony of Lowell L. Monsees.)

dence. And we have subpoenaed every person at we thought might have a copy of the original that contract, and we are unable to produce it. They are now attempting to by secondary evidence and conclusions of this witness to try to get the information on that contract in the record.

Mr. Andersen: If the Court please, that contract or a copy of it, probably a dozen copies of were given to the Army at the time it was prepared, if I know them, and I think the United States Government has in its possession a copy of that contract. We have tried and failed to find a copy of it.

The Court: It could be stipulated, couldn't it, that the contract was between the Government and these contractors?

Mr. Chatwin: I believe it is admitted in the [3] Government's answer that the contract existed, but we haven't seen it.

The Court: That is the conclusion you have reached from what you have heard?

Mr. Stroud: I think that is correct. All we want to point out is that Mr. Willis was not a party to the contract, not privy to the contract, and had under that contract no rights or duties.

The Court: I have that in mind right at this instant.

Mr. Chatwin: To that we will stipulate, your honor.

The Court: All right.

(Testimony of Lowell L. Monsees.)

Mr. Stroud: I will withdraw that last question, your Honor.

Q. (By Mr. Stroud): Mr. Monsees, one or two more questions. You testified this morning, I believe, sir, that the check from the Government on this Government contract at Bellmont came directly to the King-Hoover Construction Company, and that when they received it, it was then deposited in the bank account here in Phoenix?

A. That is correct.

Q. How do you know what they did with that check, or whether they deposited that check, or when that check came through? [79]

A. I was in direct contact with their office, and with the Army office. I knew when those checks were coming through.

Q. They told you that the check was on the way, didn't they? A. That is right.

Q. And then Mr. Hoover signed the check and deposited it in the bank account?

A. He brought the check, or sent it right to my office, and I deposited the check.

Q. You had no control over that check prior to the time that you received it, did you, sir?

A. No.

Q. Now, a moment ago, before lunch, I believe you testified that the Revenue Agents had agreed with you, or had made some statements to you that they would let this fund of money owing to the King-Hoover Construction Company come on

(Testimony of Lowell L. Monsees.)

rough so that you as party here could get your
ends on it, is that correct?

A. That is right.

Q. Isn't it a fact, Mr. Monsees, that that state-
ment is not true at all? And that, in fact, the Rev-
ue Agents and the Internal Revenue Service
made a levy on you for money?

A. I still stand exactly like I said this morning.
Q] And I will be very happy to elaborate on it,
you would like.

Q. Can you tell His Honor approximately what
the date of that conversation with the Revenue
agents was?

A. I can't recall the exact date. It was either
May or June.

Q. Of what year, sir? A. 1951.

Q. Of 1951? A. Yes, sir.

Q. Do you recall being levied on by the Internal
Revenue Service for a certain sum of money?

A. Yes, sir.

Q. In approximately October of 1951?

A. Yes, sir. Would you like for me to elaborate
on that conversation a little bit? I would be glad to.

Q. Yes. A. I was told——

Q. Who was the conversation with?

A. With Mr. Stanford.

Q. Who else was present?

A. Mr. McRae.

Q. Who else was present?

A. I don't recall whether Mr. Berger was in

(Testimony of Lowell L. Monsees.)

that particular conference or not. But I was told—— [81]

Q. Where did that conversation take place?

A. Up in the Internal Revenue office, at Mr. McRae's desk.

Q. And what was the approximate date of this conversation?

A. I don't recall the exact date. But it was pertaining to this levy, and it was mostly pertaining to releasing these funds, so that we could pay all the obligations and pay the bill that was due to the Internal Revenue Department.

Q. There was an obligation outstanding at that time? A. Sir?

Q. There was an obligation outstanding in taxes to the Internal Revenue Service?

A. That is correct.

Q. And you don't recall when that conversation took place?

A. Not the exact date, no.

Mr. Chatwin: If the Court please, the question has been asked and answered several times. He said in May or June.

Mr. Stroud: All right. That is all.

Redirect Examination

Q. (By Mr. Andersen): Would you go ahead and describe [82] this conversation you were just speaking of Mr. Monsees, in a little greater detail?

A. Yes, sir. We had been behind for quite some

(Testimony of Lowell L. Monsees.)

me about paying our bills, and about getting this job completed.

That was the reason why I had to make definite advances to the subcontractors and to the material suppliers.

The Internal Revenue was quite anxious to get their hands on any funds belonging to King-Hoover at they could, and for which I don't blame them for that.

But the thing I do object to is this, and that is that I was doing my level best to get this work out. I knew there was funds available to satisfy all claims against Mr. Willis and the King-Hoover job at Bellmont.

I talked to these boys, and I talked to Mr. McRae about it. I went to Mr. McRae for his advice on it, and it was understood that this levy was prepared ready to serve, but they assured me that they would not file it, and would let this money come through its normal channel.

That would be the quickest way to satisfy all of the obligations to the job, and for them to get their money cleared up on this job from King-Hoover. And had it not been that this was going to be the procedure, I wouldn't have stood by and let that check go the route that it did go. I could have stopped it, but I took those gentlemen at their word, that they would do just that, and I assumed that they took me at my word.

When the check didn't come through, I called Los Angeles office, and they told me that the check

(Testimony of Lowell L. Monsees.)

had come to Bellmont, the check had gone to Bellmont. I called Bellmont, and they told me up at that office that it had been levied on and taken by the Internal Revenue Department.

And furthermore, at the very time that this promise was given me that it wouldn't be levied upon, the levy had already been filed, and I didn't know anything about it.

That is all I have got to say.

Q. Did you talk to Mr. Berger and Mr. Stanford after you had found out that they had taken the money? A. Yes, I did.

Q. Can you tell where and when that conversation took place?

Q. In their office.

Q. Would you relate the conversation, as near as you can remember? [84]

A. Well, pardon me, pardon the expression, they crawfished and said there was nothing they could do about it.

Q. Did they tell you who made the levy, or who took the funds?

A. Yes. You mean the individual?

Q. Yes. A. I don't know that.

Q. Did they tell you what they had done with the funds?

A. They said they sent them directly to Washington, D.C. They didn't keep funds in their office up here.

Q. Did they tell you that they had applied the fund in the payment of any particular payroll

(testimony of Lowell L. Monsees.)

Q. Does, or debts of King-Hoover Construction Company?
A. I don't recall that.

Q. Did the joint venture ever pay the Collector Internal Revenue any funds?

A. Yes, they did.

Q. I hand you Plaintiffs' Exhibit 2 for identification and ask you if you have ever seen this document before?
A. Yes, sir.

Q. That is the check to which you have reference?
A. Yes, sir. [85]

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 2 for identification.

Mr. Stroud: No objection.

The Clerk: Plaintiffs' Exhibit 2 in evidence.

(Said cancelled check referred to was received in evidence and marked Plaintiffs' Exhibit 2.)

Mr. Andersen: May this be marked for identification?

The Clerk: Plaintiffs' Exhibit 7 for identification.

(Said cancelled checks were marked as Plaintiffs' Exhibit 7 for identification.)

Q. (By Mr. Andersen): Mr. Monsees, did the King-Hoover Construction Company ever pay the Employment Security Commission of Arizona any taxes for Unemployment Compensation?

A. Yes, sir, it did.

Q. And did they ever pay the Industrial Commission of Arizona any Industrial Commission insurance?
A. Yes, sir.

(Testimony of Lowell L. Monsees.)

Q. I hand you Plaintiffs' Exhibit 7 for identification, and ask you if you recognize those documents? A. Yes, sir.

Q. And what are they?

A. Payment for taxes and withholding taxes and payroll taxes.

Mr. Andersen: We offer in evidence Plaintiffs [86] Exhibit 7 for identification?

Mr. Stroud: If your Honor please, we think the checks payable to the Industrial Commission of Arizona are irrelevant to the issues here. We have no objection to them.

The Court: It seems so to me. What do you have in mind there?

Mr. Andersen: If the Court please, it is just for the purpose of showing the joint venture did meet its obligations, as far as employment taxes were concerned.

That is the only purpose it serves. As far as the Employment Security Commission of Arizona is concerned, I think it is quite obvious why we would want in evidence something showing the amount paid to that State subdivision.

The Court: It may be received subject to the objection.

The Clerk: Plaintiffs' Exhibit 7 in evidence.

(Said cancelled checks referred to received in evidence and marked as Plaintiffs' Exhibit 7.)

Q. (By Mr. Andersen): Mr. Monsees, Mr. Stroud has asked you questions about these addi

estimony of Lowell L. Monsees.)

nal advances, which I believe you stated to be \$300, which were made by you on behalf of Mr. Willis? [87] A. Right.

Q. When these advances were made, did you have any agreement with the King-Hoover Construction Company regarding security for repayment of these advances?

A. Nothing in writing. We had an oral agreement with Mr. Hoover.

He come into my office and says, "We are overbarrel here. We have got to get this thing completed some way," and the only way I knew to get it done was to buy the material, and I agreed to advance the money and to get it back when the next check come through from the Government on partial payment.

Q. In other words, he agreed with you that the proceeds from the contract would be the security for the repayment of this seventy-eight hundred?

A. That is right.

Q. And that is the understanding that you had with the original fifty thousand, too, was it not?

A. That is correct, yes, sir.

Q. Mr. Monsees, you were speaking here about the account which you had with Mr. Hoover's funds. Is it not true that all of the proceeds from the \$300 were deposited in this bank account over which you had control?

A. That is correct, all except the last check at [88] we didn't get.

(Testimony of Lowell L. Monsees.)

The Court: What was the amount of the last check?

The Witness: \$12,280, if I am not mistaken.

The Court: That was the final payment on completion?

The Witness: Yes, sir. That was the one that was levied upon.

The Court: I wondered what the amount was.

Mr. Andersen: I believe the complaint, your Honor, shows that amount to be \$12,278.00 and some cents.

The Court: That is all right. The witness has answered the question.

Q. (By Mr. Andersen): You were asked about the auditor for the company. Who selected the auditor for the joint venture books? A. I did.

Q. And who was that?

A. Kent Pomeroy.

Q. Did Mr. Pomeroy prepare statements reflecting profit from this joint venture operation?

A. Yes, sir.

Q. And he did prepare a final balance sheet on it, did he? A. Yes, sir.

Q. And did he prepare a summary of all the wages paid by the joint venture on this Bellmont job? [89]

A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit 3 for identification, and ask you if you recognize that document? A. Yes, sir.

Q. Would you state what it is, please?

Testimony of Lowell L. Monsees.)

A. Well, it is a claim.

Q. Claim for refund? A. For refund.

Q. With supporting schedule?

A. That is right.

Q. And to your knowledge, was the original of this claim filed with the Federal Government?

A. That is right.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 3 for identification.

Mr. Stroud: Your Honor, we object to the introduction of Plaintiffs' Exhibit 3 into the evidence, for the reason that it is a self-serving statement.

The Court: I agree with that. It is merely evidence that a claim was filed. I will admit it in evidence.

Mr. Stroud: We will admit the claim was filed.

The Court: Evidently there is a summary of certain records there. The records aren't before the Court. [90]

Mr. Stroud: The records aren't before the Court, and we have a right to cross-examine anybody that prepared them. It is not the best evidence.

The Court: Yes.

Mr. Andersen: I think that is all at this time, Your Honor.

Mr. Stroud: One more question, Mr. Monsees.

Recross Examination

Q. (By Mr. Stroud): You stated a moment ago during redirect examination that you could have stopped

(Testimony of Lowell L. Monsees.)

the checks. I assume you meant the \$12,000 owed from the Government to King-Hoover Construction Company?

A. I don't think I said I could stop the check. I think I said I could have taken other recourse. I could have taken any action providing I wasn't given to understand that this was going to come through to conclusion, as we had agreed to at that time.

Q. You don't mean to state a moment ago that you could have stopped the payment of this check, did you, sir?

A. I don't think I said that, did I?

Q. I believe you did, sir. Did you mean to imply or state that you could have stopped the payment of this [91] check to King-Hoover Construction Company?

A. No, I don't think I could have stopped payment of the check, but what I had in mind, I had other recourse. I could have held up payment of it at that time until this thing was settled, before anybody got the money, is what I meant.

Q. You could have held up payment of this check?

A. Yes, I am sure I could have.

Q. That is your conclusion, that you think you could have held up payment? Actually, you didn't have any control over the payment of a check by the United States Government on a construction job to the King-Hoover Construction Company?

A. Well, that, of course, is a legal matter, and

estimony of Lowell L. Monsees.)

m not an attorney. I don't know much about law.

Q. And that was just your conclusion that you thought you could have stopped this?

A. Let us put it this way. I could have taken steps to keep this money out of the Internal Revenue Department's hands had I known it was not coming to conclusion as planned.

Q. But your answer to my question, you had no control over that check, or the payment to the King-Hoover Construction Company by the United States Government, did you? [92]

A. Not after it was issued, no.

Q. Or before?

A. Before a check is issued on a job of that kind, it has to be approved.

The voucher, no, not the voucher, the claim for payment that is sent to them has to be approved. When a Government job like that is in progress, the claim for payment has to be made up on the spot, has to be approved by the head of the local finance depot, and then forwarded into the Los Angeles office for payment.

That is the way these were handled up there.

My step there would be to have kept that from being approved prior to the time it went to the past.

Q. You mean you would have asked someone not to approve that on the Government level?

A. That is correct.

Q. Of course, you do not know whether they would or would not have?

(Testimony of Lowell L. Monsees.)

A. I am quite sure of that.

Q. What makes you think that?

A. Because I would, I was in pretty close contact with that job up there.

Q. You had nothing to do with that contract, as I understood your testimony? That was strictly between King-Hoover and the Government? [93]

A. I was in pretty close contact with that job, and the man in charge of it.

Mr. Andersen: I object.

The Court: What difference does it make what wasn't done. It is of no interest to me.

Mr. Stroud: I think that is right. We take the position they had no right or authority.

The Court: I don't know whether they did or didn't, but I am not interested.

Q. (By Mr. Stroud): Do you have any pecuniary interest in this lawsuit, Mr. Monsees?

A. I don't know what pecuniary means.

Q. Do you have any money interest? Do you stand to gain anything from the lawsuit?

A. No, sir, I don't.

Q. You won't get any of this money in the eventuality your side wins, will you?

A. No, sir.

Mr. Stroud: All right. That is all, thank you.

The Witness: I would be glad to state my position in the case, if you would like.

The Court: Oh, I am not interested, unless counsel is.

estimony of Lowell L. Monsees.)

Mr. Andersen: I think that is all of this witness [94] at this time, your Honor.

The Court: All right, that is all.

(Witness excused.)

Mr. Andersen: I call Mr. Kent Pomeroy.

KENT POMEROY

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Andersen): Will you state your name, please? A. Kent Pomeroy.

Q. What is your occupation, Mr. Pomeroy?

A. Accountant.

Q. And with whom are you associated?

A. Cuthbert Johnson & Company.

Q. Are they certified public accountants here in Phoenix?

A. They are.

Q. Were you so associated during 1951 and 1952?

A. Yes, sir.

Q. Are you acquainted with Mr. Lowell Monsees?

A. Yes, sir.

Q. And you are acquainted with the officers of the King-Hoover Construction Company? [95]

A. Yes, sir.

Q. Were you employed to perform, that is, was the firm of Cuthbert and Johnson employed to perform an audit of the books of a joint venture between this individual and this corporation?

A. On a modified basis, yes, sir.

(Testimony of Kent Pomeroy.)

Q. Would you explain that, sir?

A. Could I refer to the report you have?

Q. Just state if you were employed to prepare a report.

A. We were employed to examine the earnings records of King-Hoover Construction Company, and to also go over the joint venture records and determine what their operation had been, the results of their operation.

Q. When you speak of earnings records, what do you mean?

A. Individual earnings records of employees.

Q. Of employees of the joint venture?

A. That is correct.

Q. Did you under the supervision of Cuthbert Johnson and Company investigate the books and records of this joint venture?

A. Yes, sir.

Q. And you prepared therefrom a rather detailed report, did you not? [96]

A. Yes, sir.

Q. Could you tell the Court what records you looked at?

A. Well, we looked at the bank statements, cancelled checks, check books, deposit slips, payroll record, vouchers, and their journal.

Q. Is that a general journal?

A. It was a combined cash journal, general journal.

Q. The journal showed both receipts and disbursements, did it?

A. Yes, sir.

Q. Arranged in chronological order?

A. Yes, sir.

estimony of Kent Pomeroy.)

Q. Was there a separate bank statement kept for
s joint venture operation? A. Yes, sir.

Q. Were there separate earnings, payroll earn-
s records kept for this operation?

A. There were separate payroll records, regis-
s, kept for the King-Hoover joint venture books,
arate from King-Hoover Company. In other
rds, there was two payroll registers.

Q. You state you prepared a report, did you?
A. Yes, sir.

Q. I hand you here Plaintiffs' Exhibit 3 for
] identification, and ask you if you recognize
t? A. Yes, sir.

Q. Would you state what it is, please?

A. This is a claim for a refund for overpay-
nt of taxes by the joint venture?

Q. And did you prepare that under the direction
Cuthbert and Johnson? A. Yes, sir.

Q. You prepared all the supporting schedules?

A. All the supporting schedules, with the excep-
n of these minutes, resolutions that are attached.

Q. Can you state of your own knowledge that
ey correctly reflect the balance sheet of the King-
over and J. E. Willis joint venture as of the
te indicated, and results of the operations for the
riod covered by the report? A. Yes, sir.

Q. And can you state under oath that the earn-
gs records as revealed by the reports is correct
d accurate as taken from the records given you
being those of the joint venture?

(Testimony of Kent Pomeroy.)

A. Yes, sir.

Mr. Andersen: We offer again in evidence, your Honor, Plaintiffs' Exhibit 3 for identification.

Mr. Stroud: We renew our objection. [98]

The Court: It was received for a limited purpose the first time, to show that the claim had been filed.

Mr. Andersen: We offer it also, your Honor, in the capacity of showing the obligation of the joint venture.

The Court: All right, it may be received for that purpose, subject to the objection. I don't know how that will be finally determined.

Mr. Stroud: We renew our same objection, if your Honor please.

The Court: All right. I may be wrong on that.

Mr. Stroud: It is a take-off of a preparation of a summary of some records.

The Court: I know. Ordinarily, when a record is summarized it is in Court for the opposite party to examine.

Mr. Stroud: Yes, sir.

The Court: But we don't have *that*.

The Clerk: Plaintiffs' Exhibit 3 in evidence.

(Said Claim for Refund was received in evidence and marked Plaintiffs' Exhibit 3.)

Q. (By Mr. Andersen): Mr. Pomeroy, did you have any conversation with either Mr. Berger or Mr. Stanford about these reports that you had prepared? A. Yes, sir. [99]

testimony of Kent Pomeroy.)

Q. Could you state the date of that conversation approximately?

A. I couldn't state the exact date.

Q. Approximately?

A. It was some time prior to filing of that claim.

Q. Could you state the substance of your conversation?

A. Yes, sir. I discussed the matter and asked them in which way they would like to have this presented to them so that they would have all the information available, so that they could make a fair and impartial decision, and it was in the spirit of cooperation to give them the necessary information, they realizing that at that time we had all the records available, and we could give them any information they needed, or they could come and look at the records if they so desired, so the claim was prepared according to their suggestion for the information that they would need.

Mr. Stroud: Your Honor, we have the original of this somewhere. I can't put my finger on it right now. We will have no objection to the offering of that, as far as its being a copy of the original. We only have some——

The Court: I don't know what you are talking about. [100]

Mr. Stroud: It hasn't been identified yet.

Mr. Andersen: Will you mark this as Plaintiffs' Exhibit 8 for identification?

The Clerk: Plaintiffs' Exhibit 8 for identification.

(Testimony of Kent Pomeroy.)

(Said copy of letter of 5/22/52 was marked for identification as Plaintiffs' Exhibit Number 8.)

Q. (By Mr. Andersen): Did you have any correspondence with either Mr. Berger or Mr. Stanford regarding this report, Mr. Pomeroy?

A. Only just conversations.

Q. I hand you Plaintiffs' Exhibit 8 for identification, and ask you if you recognize that?

A. Yes, I do.

Q. And will you state what it is, please?

A. It is a letter addressed to the Collector of Internal Revenue's office, attention Mr. Berger.

Q. That has a supporting schedule with it, does it?

A. Yes, sir.

Q. Did you dictate that letter and prepare that schedule?

A. I prepared the schedule, and the letter was sent by Wesley Johnson.

Q. Did you take the information contained in that schedule from the books and records of the joint venture? [101]

A. Yes, sir.

Q. And you can tell under oath, you can testify under oath that the information contained thereon is accurate, can you?

A. Yes, sir.

Mr. Andersen: We offer in evidence Plaintiffs' Exhibit 8 for identification.

Mr. Stroud: We object to it for the reason it is a take-off from records the originals of which are not here, and we do not have an opportunity

estimony of Kent Pomeroy.)

see them, although we have subpoenaed. I think it not the best evidence.

The Court: It will be received subject to your objection.

The Clerk: Plaintiffs' Exhibit 8 in evidence.

(Said letter of 5/22/52 was received in evidence and marked Plaintiffs' Exhibit 8.)

Mr. Andersen: May this be marked for identification?

The Clerk: Plaintiffs' Exhibit 9 for identification.

(Said work sheets were marked as Plaintiffs' Exhibit 9 for identification.)

Q. (By Mr. Andersen): Did you prepare detailed schedules of the earnings record of the King-Hoover Construction Company and the joint venture, Mr. Pomeroy? [102]

A. Yes, sir.

Q. And you prepared those on working papers, is that right?

A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit 9 for identification and ask you if those are the schedules which you speak?

A. These weren't entirely worked on by me, but that particular phase of it was not, sir.

Q. Was that done under your supervision?

A. Yes, sir. This is not all my handwriting here.

Q. But it was done under your supervision?

A. That is right.

Q. And these records here do support in detail

(Testimony of Kent Pomeroy.)

the Plaintiffs' Exhibit 8 which you have just identified? A. That is right, they do.

Mr. Andersen: We offer in evidence, your Honor, Plaintiffs' Exhibit 9 for identification.

Mr. Stroud: May I see it?

Q. (By Mr. Andersen): Do you know where the original payroll records of this company are?

A. No.

Q. You did have them in your possession at the time you prepared these reports, did you?

A. I did. [103]

Q. Who did you deliver them to when you got through?

A. I don't recall who came and got them. I really don't. They were in the office quite a while, and I don't know who finally came and picked them up.

Mr. Stroud: We object to Plaintiffs' Exhibit 9 for the reason it is a take-off on some records, the originals of which are not here, not in Court, and I think the witness also testified that he didn't personally do it.

The Court: Yes.

Mr. Stroud: I don't believe it is the best evidence.

Mr. Andersen: I think, your Honor, he testified it was done under his supervision.

The Court: What does that mean?

Mr. Andersen: I beg your pardon, sir?

The Court: What does that mean? Somebody else copied them from the record? He didn't stand

testimony of Kent Pomeroy.)

re and look over his shoulder while he copied it.
Mr. Andersen: Mr. Pomeroy has testified that these records are correct, and I think most of the work done in Accountants' offices is done by personnel underneath.

The Court: I know. But usually the books are available. You don't have to take the Accountant's word for anything. You may have your own Accountant.

Mr. Andersen: We have attempted to find these books, [104] too, and are unsuccessful.

The Court: Is this company still in existence?

Mr. Andersen: No, it has been defunct for some years.

The Court: Hence this lawsuit?

Mr. Andersen: Yes, your Honor. Would your Honor rule on the admissibility?

The Court: That only supports the other exhibit, doesn't it?

Mr. Andersen: Yes.

The Court: I don't believe I will admit that. The other is in evidence.

Mr. Andersen: I think that is all.

Cross Examination

Q. (By Mr. Stroud): Mr. Pomeroy, I believe you had a conversation with one or two of the Revenue Agents concerning the books and records of King-Hoover Construction Company, and the question at that time was asked as to whether you could make a breakdown between the King-Hoover Con-

(Testimony of Kent Pomeroy.)

struction Company payroll records and the specific job which King-Hoover Construction Company undertook in Bellmont, Arizona, is that correct, sir?

A. I can't recall any such conversations. However, [105] they may have gathered from this fact that there was one earnings record, there was one earnings record for each employee.

However, there were two payroll journals.

Q. And those earnings records were under the King-Hoover Construction Company's books, were they not?

A. They were detailed records to which each employee's earnings were brought together in one place for making the Social Security reports.

Q. Yes.

A. Thus if an employee who reached \$33,000, if you put it in two places, he could go up to \$3,000 in both places before he would be exempt from taxes, and it would cause confusion. So there had to be one earnings record for each employee, although there were two payroll journals, one for the joint venture, and one for the corporation.

Q. Do you recall telling the Revenue Agents on that time and occasion that the records were so commingled that you couldn't tell the construction job at Bellmont from any of the other jobs?

A. Absolutely not.

Q. You don't recall saying that?

A. No, sir.

Q. A while ago you were answering questions, and you [106] were, I suppose, assuming that this

testimony of Kent Pomeroy.)

is a joint venture. You don't know, of your own knowledge, whether this was a partnership or a joint venture, other than what somebody told you, you, Mr. Pomeroy?

A. Well, I know at the time they started to go into this deal that I was told that they were going to have a joint venture.

Q. You were told that, were you not?

A. That is right.

Q. And that is the basis of your information and knowledge that this so-called financing relationship was a joint venture partnership, was it not?

A. Well, it had all the other——

Q. I ask you, sir, if that is the basis of your knowledge?

A. I only know what I am told.

Mr. Stroud: All right. I don't know that it is necessary to make a motion to strike his conclusion that this was a joint venture or partnership. I think that is the ultimate question for the Court.

The Court: The Court will decide it.

Mr. Stroud: Yes.

Q. (By Mr. Stroud): Now, you testified that you were the accountant for the King-Hoover Construction Company and prepared [106-A] some of these schedules and take-offs, is that correct?

A. Our firm, Cuthbert Johnson and Company, was employed as the accountants, and I am employed by the Cuthbert Johnson Company.

Q. Yes, sir, and you were employed by the

(Testimony of Kent Pomeroy.)

King-Hoover Construction Company, is that correct? A. Not as their employee, no.

Q. Who were you employed by?

A. By Cuthbert Johnson Company, CPA firm.

Q. I understand who you are employed by, Mr. Pomeroy. A. Yes.

Q. I say, the firm was employed by the King-Hoover Construction Company?

A. That is right.

Q. Now, it is true, is it not, sir, that at no time ever from 1950 up until today, has there been any copartnership Federal income tax returns ever filed for any so-called joint venture or partnership, isn't that true?

A. Not to my knowledge, there hasn't been any.

Q. Have not been any filed?

A. I don't know that there has or there hasn't.

Q. You didn't do it if there was one?

A. I didn't do it. [107]

Q. Sir?

A. No, sir, I didn't file any.

Q. Now, did you have anything to do with preparing the payroll tax returns. I think they have been introduced as Plaintiffs' Exhibit Number 4.

Did you have anything to do with the preparation of the Employers Quarterly Federal Tax Return?

A. Not the original ones, no.

Q. Do you know of your own knowledge whether these were the Employers Quarterly Federal Tax Returns filed during this period of time?

A. May I say something to clarify this. I don't

testimony of Kent Pomeroy.)

Q. Now who this is signed by. I recognize this signature as their office manager.

A. He was the office manager of the King-Hoover Construction Company, is that right?

A. That is right.

Q. Sterling Page. In fact, all those are signed by an officer of the King-Hoover Construction Company, are they not?

A. Yes, sir. Now, we did amend these, and corrected them.

Q. May I ask you this, sir. The party reporting, making this tax return, is the King-Hoover Construction Company, is it not? [108]

A. Yes, sir, that is right.

Q. The corporation. There is no mention on these returns anywhere about any partnership or joint venture, is there?

A. No, sir.

Q. Did you ever see the books of account of the King-Hoover Construction Company yourself?

A. Yes, sir.

Q. Will you tell His Honor whether there was or was not a capital account outstanding in the name of Mr. or Mrs. J. E. Willis?

A. No. I don't think there was. To my knowledge of the books, I never saw such an account.

Q. Do you know how this advancement, or loan, of \$50,000 was set up on these books which aren't here in Court today?

A. They were set into a separate joint venture account set of books.

(Testimony of Kent Pomeroy.)

Q. Sir?

A. They were set up as a separate set of books in a joint venture account.

Q. Do you know how the money which was advanced to this corporation by Mr. and/or Mrs. Willis was set up or carried as an item on the accounting books of the King-Hoover Construction Company? Do you know of your own [109] knowledge?

A. It was deposited in the bank.

Q. I understand that the money was deposited in the bank, Mr. Pomeroy. But my question is, do you know how this advance or loan was set up on the books of the King-Hoover Construction Company, sir?

A. I don't know how the original entry, I don't recall how the original entry was set up, although when we came in on the picture it was at the end. And we were just trying to find out what the operation was, and how much was due the various creditors during the time.

Q. You don't know how that was set up or carried on these books of the King-Hoover Construction Company?

A. It wasn't set up as a capital account.

Q. No, but the King-Hoover Construction Company would have had to set this item up on their books, they would have had to account for it?

A. They probably set it up under the name of Willis. I don't recall just how they did set it up.

Q. You said they probably would, but you don't know? You didn't see it?

estimony of Kent Pomeroy.)

A. Well, I can't recall it.

Q. You don't recall how it was set up on their books?

A. No.

Q. You didn't obtain or ask for a separate account, [110] or separate account number for the joint venture from the Internal Revenue Service, did you, Mr. Pomeroy?

A. I didn't have anything to do with that, because that was handled by their own personnel.

Q. You mean King-Hoover?

A. That is right.

Q. Handled that?

A. Yes.

Q. They made the payrolls and paid the bills, didn't they not?

A. Bills were paid by Mr. Monsees, and under his supervision.

Q. Now, as a matter of fact, the bills came to the King-Hoover Construction Company, did they not?

A. I believe they did.

Q. The bills were in the name of the King-Hoover Construction Company, were they not?

A. There may have been some that weren't, or back and forth. There might have been some back and forth. I don't recall. I wouldn't want to say definitely one way or the other on that.

Q. Mr. Monsees merely co-signed the checks along with Mr. Hoover, or some other officer of the King-Hoover Construction Company, isn't that correct?

A. He had the control signature. [111]

Q. It had to have two signatures on them?

A. That is right.

Q. And one of them was one of the officers of

(Testimony of Kent Pomeroy.)

the King-Hoover Construction Company, was it not? A. That is right.

Q. The bank account was in the name of the King-Hoover Construction Company, was it not?

A. I believe it had some other designation on it.

Q. Did you ever see it?

A. Yes, I did. But I can't recall what it was. I think it was called Railroad Account.

Q. King-Hoover Construction Company Railroad Account, was that the way it was denominated?

A. I am not altogether sure about that, but it had some particular title to it.

Q. There were no payments or salary of any kind made to Mr. Willis by the King-Hoover Construction Company, were there, Mr. Pomeroy?

A. None that I can recall. I don't believe we made any salary payment to him.

Mr. Stroud: I believe that is all. Thank you, sir.

Redirect Examination

Q. (By Mr. Andersen): Just a question or two. As a matter of fact, [112] weren't there actually two bank accounts which you made your report from? In other words, you made your report from two accounts?

A. Yes, there was. I believe there was one that was carried under—come to think about it, I think that they carried one under that name, and they carried one under Lowell Monsees' name. I am not sure of that, but it seems to me it was.

testimony of Kent Pomeroy.)

Mr. Stroud: If the witness is not sure of his answer, we request he not answer about something he is not sure about.

Mr. Andersen: He is testifying to his own recollection, your Honor.

The Court: That is all anyone can testify to.

The Witness: It is a long time.

Q. (By Mr. Andersen): Do you know whether or not there were two signatures required on the checks that were drawn on the account of Mr. Lowell Monsees?

A. No, but I don't think there would be, because it was in his name.

Q. All right. Referring to this question Mr. Stroud asked you about the capital account. Was there a ledger, a general ledger kept? [113]

A. No.

Q. For this concern?

A. No general ledger.

Q. That is, you took your records from these journals which you have spoken of from the payroll records, the bank statements, and the cancelled checks, and the vouchers?

A. That is correct.

Q. And there was no general ledger set up as such?

A. That is correct, no general ledger.

Q. And the only place that a capital account could appear would be in a general ledger, is that true?

A. That is right.

Q. Would you tell the Court how the payroll

(Testimony of Kent Pomeroy.)

fund was paid? In other words, was there a revolving fund for the payroll?

A. It was handled on a revolving fund basis, because of the employees of this company, this joint venture, were working on other jobs, see, but there were two payroll records kept, so whenever the payroll on this job, joint venture job, amounted to a certain sum of money, Mr. Monsees would give him that amount of money to meet the checks, so it was handled on a revolving fund basis.

Q. Do you mean individual checks were drawn, would you say, from the King-Hoover bank account? [114]

A. That is right.

Q. But they each time presented a bill to Mr. Monsees specifying the bill for the employees that worked on the joint venture job?

A. That is right.

Mr. Stroud: If your Honor please, we object to somebody presenting a bill to somebody. I don't know that there is any evidence on that here.

Mr. Andersen: We are just trying to get a description of the operation, your Honor.

I believe that is all.

The Court: That is all, Mr. Pomeroy.

(Witness excused.)

Mr. Andersen: I call Mr. Sam Berger.

SAM BERGER

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

testimony of Sam Berger.)

Direct Examination

Q. (By Mr. Andersen): State your name, please?
A. My name is Sam Berger.

Q. Where do you live, Mr. Berger?

A. 2106 West Avalon Drive.

Q. In Phoenix? [115] A. In Phoenix.

Q. What is your occupation?

A. I am Chief of the Accounts Section at the Internal Director of Internal Revenue office.

Q. Were you so employed throughout 1950 and 1951?

A. No. At that time I was employed as a Deputy Collector.

Q. Under whose supervision did you work at that time?

A. At that time I was under the supervision of Mr. Sisson, who was chief of the Field Division.

Q. And Mr. William P. Stuart was over him, is he?

A. Yes, sir, he was the Collector.

Q. What were your duties in that capacity, Mr. Berger?

A. As Deputy Collector, I was required to secure delinquent returns. I was required to make assessments, collections. I was required to audit books and records.

I was required to assist and aid taxpayers in preparing returns.

I was required to advise taxpayers regarding their tax problems.

(Testimony of Sam Berger.)

Q. Was it part of your job to make levies for delinquent taxes?

A. During my work in the collection of warrants, I [116] was required to levy for the collection of taxes.

Q. And to make demand for payment, were you? A. Yes, sir.

Q. When did you first become acquainted, or did you become acquainted with Mr. Lowell Monsees here?

A. I first became acquainted with Mr. Lowell Monsees on May 23, 1952.

Q. You hadn't talked to him before that date?

A. Not to my knowledge.

Q. Do you mean 1952? A. 1952.

Q. And you hadn't seen him after that?

A. Well, sir, that is a rather hard statement to answer. I may have seen the gentleman in the office while he was visiting with some other Deputy Collector, or while he was in the office, but I don't recall any prior contact to May 23, 1952.

Q. Were you assigned to collect delinquent taxes for the King-Hoover Construction Company?

A. Yes, as a member of the Seizure and Sales Squad I did have that file for some period.

Q. When did you commence to work on that?

A. I would say it was early. It was after the filing. In 1952.

Q. You didn't work on it in 1951 at all? [117]

A. No, sir, in 1951, I was assigned to the Field Audit of income tax returns.

estimony of Sam Berger.)

Q. Did you ever talk to Mr. Monsees about this delinquent account?

A. During the period in which I held the warranties for distraint in the name of King-Hoover, I never had any reason to contact Mr. Monsees.

Q. Well, did you ever contact him?

A. Yes, I did, on May 23, 1952.

Q. Could you state the substance of the conversation you had with him at that time?

A. Yes. The Assistant Commissioner, one of the Assistant Commissioners in Washington requested that a Collection Officer contact Mr. Monsees and ask him certain questions regarding the operations of the joint venture alleged to be between Mr. Willis and King-Hoover.

And Mr. Stanford and I went to Mr. Monsees' office. It was in the morning of May 23, 1952.

Do you wish me to go on as to the nature of the conversation or would you rather question me on it?

Q. I think that is enough at this point, Mr. Berger.

Mr. Berger, do you know the dates that the levies, or rather, the demand for payment was made on King-Hoover Construction Company for delinquent payroll taxes, covering the last quarter of 1950 and the first [118] three quarters of 1951?

A. I have that information in my possession.

Q. Could I have that?

A. However, I would like to explain prior to

—

Q. Go right ahead, Mr. Berger.

(Testimony of Sam Berger.)

A. These assessment lists I have are in my hands for safekeeping, and if they are to be introduced as evidence, I would appreciate that photostats be introduced rather than the original assessment lists, in view of the fact that these lists are used for other purposes continually.

Mr. Andersen: That request will have to be directed to the discretion of the Court.

The Court: Do you have photostats there?

The Witness: No, sir, we didn't have time to secure the photostats.

The Court: All right, they may be introduced and photostats substituted. We will see that your records are not lost.

The Witness: All right. What was the quarter you were interested in, sir?

Q. (By Mr. Andersen): For the last quarter of 1950, and the first three quarters of 1951.

A. We have eleven assessment lists here. If you [119] like, I will enumerate the assessments. Let's see. I will have to go through them.

Q. Is it not true, Mr. Berger, that you made what you call jeopardy assessments on the King-Hoover Construction Company prior to the time that you had knowledge of the exact amount of the liability, did you?

A. Well, I did not make jeopardy assessments, but it is true that in one case a jeopardy assessment was made legally under section 3612 of the Internal Revenue Code.

Q. Who was that made by?

estimony of Sam Berger.)

A. I believe that the assessment was signed by Mr. Stanford? Is that right? I am not familiar, in view of the fact that the original returns are not in my hands. I merely have the assessment list, so I couldn't really answer your question factually.

Q. Now, would you just state, Mr. Berger, the dates that the assessment was made, and the dates that demand was made for the payroll taxes due for each of the four quarters which I mentioned?

A. The assessment for the third quarter of 1951 was received by our office on October 9th.

And the warrant for distraint was issued on that date. An assessment for the employment taxes due for the second quarter of 1951 was received in our office [120] on August 27, 1951, and the first notice was issued on August 27th, 1951.

Q. That notice you mentioned, do you call that demand for payment?

A. We are legally required to issue a notice and demand for payment, our form number 717.

Q. And that was issued, was it, on August 27, 1951?

A. It was.

Q. Thank you.

A. Our assessment for Federal Unemployment tax for the year 1950 was received by our office on March 12th, 1951, and the first notice was issued on the same day.

The Court: We will have our afternoon recess.

(A short recess was had.)

The Court: You may proceed.

(Testimony of Sam Berger.)

Mr. Andersen: Mark this as Plaintiffs' Exhibit 10 for identification.

(Said statement was marked as Plaintiffs'

The Clerk: Plaintiffs' Exhibit 10 for identification.

Exhibit 10 for identification.)

Mr. Andersen: And will you mark this for identification, please?

The Clerk: Plaintiffs' Exhibit 11 for identification.

(Said envelope containing assessment lists was marked Plaintiffs' Exhibit 11 for [121] identification.)

Q. (By Mr. Andersen): I hand you Plaintiffs' Exhibit 11 for identification, Mr. Berger, and ask you to state what it is.

A. It represents the assessment lists and certificates covering assessments made against King-Hoover Construction Company for the period in dispute here.

Q. That is for the last quarter of 1950, and the first three quarters of 1951, is that true?

A. That is right.

Q. And this assessment list contains, does it not, the dates when the assessments and demand for payment were made? A. Yes.

Q. And a record of taxes assessed against the King-Hoover Construction Company, and the payments made on those assessments, is that right?

A. That is right.

Mr. Andersen: We offer in evidence the assessment lists.

Mr. Stroud: No objection.

estimony of Sam Berger.)

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 11 in evidence.

(Said assessment lists were received in evidence and marked Plaintiffs' Exhibit 11.)

Q. (By Mr. Andersen): Mr. Berger, I will ask you if you used as the basis for the assessment the payroll reports filed by the King-Hoover Construction Company?

A. In every case, except that of the jeopardy assessment, which was made for the one quarter.

Q. And the jeopardy assessment, I take it, was made prior to the date that you had received a payroll report covering the period for which that assessment was made?

A. I think that is correct.

Q. Now, you state, do you, Mr. Berger, that you had no connection with this King-Hoover Construction Company delinquent account prior to May 1952?

A. No. I stated that I had not had any contact with Mr. Monsees prior to that date.

Q. Would you state what your activities were concerning this delinquent account in 1951?

A. In the early part of 1952, I was given the warrants for distraint on King-Hoover Construction Company then outstanding, and I was a member of the Seizure and Sales Squad, and I was required to secure collection for the Government. I investigated to determine the necessary means for collection.

I determined that one lien—no, I determined

(Testimony of Sam Berger.)

[123] that collection was required by seizure, and turned the accounts over to Mr. Yager, who was then the head of the seizure operation, and he proceeded to seize and sell and collect the tax.

Q. You didn't have any connection with this account before 1952, then, is that your testimony?

A. Not to my knowledge.

Q. I hand you Plaintiffs' Exhibit 10 for identification, and ask you if you recognize that statement?

A. No, sir.

Q. You have never seen that before?

A. No, sir.

Q. You don't know by whom it was prepared?

A. May I examine it again?

Q. Yes.

A. There is no identifying characteristics. It is a typewritten statement. I don't know who prepared it.

Q. I hand you here Plaintiffs' Exhibit 2 in evidence, and ask you if you have ever seen that before?

A. No, sir.

Q. Do you know whether or not the sum represented by that check was applied against the indebtedness of King-Hoover Construction Company?

A. I could not answer that question without tracing the block number, the date of payment, and date of [124] cancellation.

Q. Would that information appear on the assessment list you just handed me if it were so applied?

estimony of Sam Berger.)

A. This payment would be reflected either wholly against one account, or separately against several accounts.

Q. Could you tell the Court whether or not that check was applied against the King-Hoover Construction Company's debts?

A. Yes, sir, that was applied to the account number 2-170310-51, Employment Taxes.

Q. For what period?

A. I believe that is the fourth quarter of 1950.

Q. Thank you. You don't know whether this check was sent in with a return filed for the first quarter of 1951, or not, do you?

A. That I could not determine.

Q. Is it the practice of your office, Mr. Berger, when you receive money like this, to apply it on the oldest account that you have for that particular concern?

A. No.

Q. The oldest in point of time, I am speaking of.

A. No, it is not. In view of our duty to protect the lien rights, the practice is to apply payments to the newer accounts. [125]

Q. Do you observe the wishes of the taxpayer when they submit a check of that kind in application to a particular indebtedness, or do you just use your own discretion on what it should be used for payment of?

A. That is a question which cannot be completely answered here. It is a subject of a good deal of discussion. If the taxpayer specifically requests that an account be credited, a specific ac-

(Testimony of Sam Berger.)

count be credited, and the application does not injure the Government's prior liens, it would be done.

Q. But you would ignore the request of the taxpayer if you felt that it did injure the Government's lien or position?

A. No, sir, I would take the taxpayer on his request to my superior, and let him make the decision. We don't ignore the request of any taxpayer. If the matter came up, it would not be one for me to decide.

Q. If a check accompanies a return, and it indicates, because of a correspondence between the amount of the check and the amount shown to be due on the return, would you consider that a request of the taxpayer to have that check applied on the payment of the return it was submitted with?

A. Normally the payment never reaches my hands, nor does the check—the current return or delinquent return [126] would be processed by the Commissioner's division, and the check would be applied to the return it accompanied, as a matter of course.

Q. Is that always done?

A. With the thousands of returns that are involved each month, it would be impossible to do otherwise, unless the check does not coincide with the amount of the return.

Q. I think you stated just a moment ago, Mr. Berger, that this check was applied in payment of

testimony of Sam Berger.)

amount due for the year 1950, and this check
its date of May 8th, 1951.

How do you explain the fact that this was ap-
plied to the payment of 1950 indebtedness when
it was submitted in 1951 with another return?

A. I cannot state that it was submitted with
another return. I can state that we are continually
receiving payments after accounts are assessed and
paid, and that we apply them to those accounts.

Q. Could you state under oath that if this were
submitted with another return that it would be ap-
plied in payment of the indebtedness shown due
on that return?

A. I could not state under oath, because I did
not handle the check.

Q. You don't know, then? [127]

A. I could state the practice, that the check is
applied to the return it accompanies.

Mr. Andersen: I think that is all.

Cross Examination

Q. (By Mr. Stroud): Mr. Berger, do your as-
sessment lists that are introduced in evidence by
the plaintiffs show the date on which these assess-
ment lists were received by the Commissioner here
in Phoenix?

A. They do show the dates they were received
at that time by the Collector in Phoenix.

Q. Now, sir, directing your attention to an in-
terview that you had with Mr. Monsees on May
15th, 1952, do you recall such a meeting?

(Testimony of Sam Berger.)

A. Very clearly.

Q. Who was with you on that time and occasion, sir?

A. Mr. Jack Stanford, a Deputy Collector of the Collector of Internal Revenue's Office.

Q. Did you go to see Mr. Monsees on that date and at that time to ask him some questions concerning the King-Hoover Construction Company?

A. I did.

Q. Did you make notes on what his answers in response to your questions were? [128]

A. Yes, sir, I did.

Q. I will ask you, sir, if he told you at that time and on that occasion that he, as such, nor Mr. Willis had any supervisory capacity on the job up in Bellmont, Arizona?

A. He did, sir.

Q. Did he made that statement to you?

A. Yes, sir.

Q. And in the presence of Mr. Stanford?

A. Yes, sir.

Q. Did he also tell you that he had no active part or participation in the job at Bellmont which was being undertaken by the King-Hoover Construction Company? A. Yes, sir.

Q. Did he tell you also at that time and occasion that the direction and supervision of the job was handled by the King-Hoover Construction Company through Mr. Hoover?

Mr. Andersen: If the Court please, this is leading the witness, your Honor.

(testimony of Sam Berger.)

Mr. Stroud: This is cross-examination.

The Court: Everything you asked, I knew the answer before it was given. The witness testified the same thing.

The Witness: I will be happy to read his answers [129] word for word. I have them here.

The Court: Mr. Monsees didn't testify to anything different.

Mr. Andersen: If the Court please, I don't know what purpose this serves.

The Court: It isn't serving any, because I have heard the same thing before from Mr. Monsees. He doesn't claim he had charge of that work up there.

Q. (By Mr. Stroud): Did Mr. Monsees on that one and occasion tell you that he was in this picture to protect the loan of Mr. Willis to the King-Hoover Construction Company?

A. Yes, he did, sir.

Q. Did he tell you he was on the job up at Bellmont approximately once a month?

A. Yes, sir.

Mr. Stroud: That is all.

Redirect Examination

Q. (By Mr. Andersen): The purpose of this conversation on May 23rd, 1952, Mr. Berger, was not for the purpose of finding out what assets, what other assets were owned by way of equipment that you could get hold of that belonged to King-Hoover Construction Company? [130]

(Testimony of Sam Berger.)

A. No, sir, not at all.

Q. What was the purpose of that visit?

A. Mr. Willis, through Mr. Monsees, filed a claim for refund of taxes which he claimed were paid in error, or, that is, were tax moneys that were seized in error.

As a result of the claim for refund, I was requested by the Deputy Commissioner, a Deputy Commissioner in Washington, to secure answers to specific questions. In the presence of Mr. Stanford, we asked these questions and secured these answers.

Q. Did you have anything to do with levying on the equipment belonging to King-Hoover Construction Company?

A. I made one trip to examine—let me change that. I had had several years experience with heavy duty equipment.

Mr. Stroud: If your Honor please, I don't think that particular question is directed to this lawsuit. I don't believe it is material.

The Court: I can't see that it is. It may be.

Mr. Andersen: Well, about the only object of this examination, your Honor, is to show that they did investigate this equipment, and that the equipment, we want to prove later on, the equipment existed at the time they took these funds in payment of debts. [131]

The Court: You mean the Government was overpaid?

Mr. Andersen: Well, they were, that, too. But that wasn't the object of it.

testimony of Sam Berger.)

The Court: All right, go ahead.

Q. (By Mr. Andersen): Go ahead, Mr. Berger.

A. I made one trip to examine a D-7, I believe was, caterpillar tractor, to attempt to secure the actual numbers on that piece of equipment. That is the only connection I had with any of the actual seizure or sale thereafter.

Q. You do know, though, of your own knowledge, do you not, Mr. Berger, that there was a great deal of King-Hoover's equipment which was seized under a warrant of distraint, and the funds applied in the payment of these payroll taxes, as shown by this assessment list?

A. Yes, I do.

Q. Do you know approximately how much that was?

A. No, as I stated before, the warrants went to the seizure Deputy Collector, and left my hands. After leaving my hands, with other cases to consider, I had no time for it.

Mr. Andersen: I think that is all. [132]

Recross Examination

Q. (By Mr. Stroud): This levy on this property up there was made to get payment on additional income, on back payroll taxes that were owed by the King-Hoover Construction Company, were they not, Mr. Berger?

A. Yes, sir.

Q. There is no doubt that the \$867.23 was a tax levied by the King-Hoover Construction Company, was there?

A. No, sir.

(Testimony of Sam Berger.)

Q. There hadn't been any overpayment of any payroll taxes as yet from the King-Hoover as yet, has there?

A. Any overpayment which resulted from the sale and seizure of that property I believe was returned. There was a slight amount which the sale realized, although I am not familiar with the exact amount.

Q. You mean the property brought in more money than the tax owed?

A. Yes. And that money was returned.

Q. That money was refunded? A. Yes.

Mr. Stroud: That is all. [133]

Redirect Examination

Q. (By Mr. Andersen): Who did that money go to, do you know?

A. Mr. Stanford may have that information in his file. I don't know.

Mr. Andersen: That is all.

(Witness excused.)

Mr. Andersen: I call Mr. McRae.

WILLIAM McRAE

called as a witness in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Andersen): Will you state your name, please? A. William McRae.

Q. What is your occupation, Mr. McRae?

(Testimony of William McRae.)

A. Attorney at law.

Q. What was your occupation during the year 1951?

A. I was head of the income tax division in the office of the Collector of Internal Revenue at Phoenix.

Q. Do you know Mr. Lowell Monsees?

A. Yes.

Q. Could you state when you first met him, [134] approximately?

A. I presume about 1951 or 1952, along in there, in connection with this, with the tax matter that was pending at that time.

Q. Did he come to your office in the post office building? A. Yes.

Q. Who was present at the time that you spoke to Mr. Monsees?

A. On that occasion, Mr. Monsees, one or two of the Deputy Collectors, and I don't recall whether he had anyone connected with this company or not.

Q. Could you state who the Deputy Collectors were?

A. Jack Stanford I think was one. And I wouldn't know for sure whether the other could have been either Berger or Yager, who it might have been.

Q. Could you state the substance of the conversation which took place in your office at that time?

Mr. Stroud: We object as being immaterial and irrelevant.

(Testimony of William McRae.)

Mr. Andersen: If the Court please, we have gone over this matter of the understanding of these parties about the joint venture agreement several times, and I think it is important we determine here whether or not these agents of the defendant understood the relationship [135] between Mr. Willis and the King-Hoover Construction Company, and that is the purpose of this testimony.

Mr. Stroud: I think that is a matter for your Honor to decide.

Mr. Andersen: He can only do it on evidence.

Mr. Stroud: I think it is repetitious.

The Court: It might not be of much help. Go ahead.

A. (By the Witness): The purpose of the visit was to—of his visit was more or less to claim, or to allege, that the Government was pursuing funds that was due his client as one of the joint venturers in a contract which Mr.—I have forgotten the other party's name.

Q. (By Mr. Andersen): Willis?

A. Willis, and King-Hoover Company had joined together as in a joint venture to carry out the terms of this bid or contract to do some construction work.

Q. He showed you a contract, did he?

A. I don't recall whether he showed me or whether he established by way of conversation that there was such a joint venture contract.

I was satisfied that there was an agreement

(Testimony of William McRae.)

wherein his client was supposed to have put up \$50,000 in [136] cash, and the job was substantially completed. He alleged that the bills had been paid and that there was certain profit due on the contract, that the Government agents were attempting to collect and apply against the King-Hoover tax liability that were not connected with the joint venture operation.

Q. And what did you tell Mr. Monsees in the presence of Mr. Stanford here, and whoever else was there?

A. I stated that if that——

Mr. Stroud: Same objection, your Honor, to hearsay. The first testimony he just made is hearsay. It is wholly irrelevant and immaterial. What this gentleman had to say to Mr. Monsees couldn't have any bearing on this lawsuit.

Mr. Andersen: We are dealing here with the Government, and just who the Government is is quite a question. But Mr. Monsees had to deal with someone. We have successfully established that Mr. Stanford and Mr. Berger were agents.

The Court: I will let him testify.

Mr. Andersen: All right.

A. (By the Witness): Read the question again, please.

(The pending question was read by the Reporter.)

I stated that in my opinion if the money that [137] was coming belonged to the joint venture, then

(Testimony of William McRae.)

only that part that would become the property of the King-Hoover Company, whatever percentage that might be, could be held for the payment of King-Hoover's debts. But that all of it could be held for any liability, tax liability, that is, that would be owing on the particular job.

Mr. Stroud: We renew our objection to the witness's opinion concerning the matter, concerning the joint venture.

The Court: All right.

Q. (By Mr. Andersen): Was there anything else said there, Mr. McRae, that you recall?

A. No, not that I recall. There was much more that was said, because the conversation lasted, I guess, for twenty or thirty minutes, so there was a lot said. But it has been some time ago, and I haven't taken any occasion, or had occasion to refresh my memory, outside of what has run through my mind since I was subpoenaed.

Q. You can't place this conversation exactly as to date, is that right?

A. Well, it was about the time that the final settlement was made by the Government Agency that was paying the money. It was my understanding that the levy had been filed, but that the boys in the office probably [138] didn't know that such levy had been made.

Q. It was prior in time to the date that the final payment was made, then?

A. Yes, a matter of days.

Mr. Andersen: I believe that is all, your Honor.

(Testimony of William McRae.)

Cross Examination

Q. (By Mr. Stroud): Mr. McRae, you say you didn't know anything about this so-called joint venture, except what Mr.—what the people told you from King-Hoover Construction Company, and Mr. Monsees?

A. I didn't state that. I stated that I didn't recall now whether or not they showed me the contract, or whether they told me of the contract and let me know that there was such a joint venture arrangement at that time.

Q. You didn't know whether it was a joint venture or not, except from what they told you at that time, did you?

A. Well, I satisfied myself that there was a joint venture.

Q. You didn't know how the payrolls on the records were set up at that time, of either King-Hoover Construction Company or the other, did you? [139]

A. Yes, I inquired as to that at that time.

Q. As to what Mr. Monsees told you?

A. I think each of the parties were in agreement as to certain facts as to how the payroll accounting and the other accounting was being made. I don't think there was any dispute on the facts.

Q. You mean the agents at that time agreed with everything that Mr. Monsees had said?

A. Either agreed or sanctioned it by their silence.

(Testimony of William McRae.)

Q. You assumed that they were assenting by a silence, were you?

A. I didn't call for the books.

Q. Then if that is your point, you didn't even see the books, did you, Mr. McRae?

A. No.

Q. And the only thing you know about this so-called partnership is what Mr. Monsees told you at that time?

A. No, that isn't all.

Q. You never made any audit of the books, did you?

A. No.

Q. You didn't go out and inspect the construction company job, did you?

The Court: He said he didn't.

The Witness: You want me to answer no. I told you that once. [140]

Mr. Stroud: All right.

Q. (By Mr. Stroud): You didn't know what part Mr. Willis played in this so-called partnership, did you?

A. Yes, sir, I think I did.

Q. Based on what, what Mr. Monsees told you?

A. Well, afterwards I also talked with Mr. Hoover, and Mr. Hoover confirmed everything that was said.

Q. And of course, you say you don't remember whether you saw this so-called joint venture agreement of November 16, 1950, is that correct?

A. I don't recall now whether I did or didn't.

Q. Of course, you would have to read that joint venture agreement in order to know what it was, would you not?

(Testimony of William McRae.)

A. If they had it with them, I read it.

Q. But you don't recall now whether you ever saw that or not?

A. I don't recall whether I read it at that time, no.

Mr. Stroud: That is all.

Redirect Examination

Q. (By Mr. Andersen): Didn't you talk to Mr. McAlister of the District Attorney's office here about this in their presence? [141]

A. I talked to—yes, I am sure they called Mr. McAlister on the same matter at that time. As I recall it, I also talked with George Hill.

Q. Didn't you read this contract to Mr. McAlister over the phone, and parts of it?

Mr. Stroud: We object to counsel leading his witness, if your Honor please.

Mr. Andersen: I think it is a yes or no answer, your Honor.

The Court: We just want to get at the facts, not the technical rules of evidence.

A. (By the Witness): I did everything I could to ascertain what the facts were relating to the matter, to the ownership of the moneys that was coming, and I didn't state how the money should go, or whether it could be held without inquiring into all the facts relating to the whole transaction. And I called Hill.

(Testimony of William McRae.)

I also had an opportunity either at that time, or within a matter of a few days, to talk with Mr. Hoover, and I ascertained that there was in everyone's opinion that was connected with this, that there was a joint venture agreement, and I probably read it. But I couldn't say for sure now that I did.

If they had it with them, I know I did. [142]

Mr. Andersen: I think that is all, your Honor.

Recross Examination

Q. (By Mr. Stroud): You know, Mr. McRae, that there is no evidence of any joint venture agreement here except the language used in the agreement itself, don't you? A. No.

Mr. Andersen: Your Honor, Mr. McRae hasn't been in the Court room during the trial. I don't think he can be called on to answer that.

Mr. Stroud: I believe that is all.

Mr. Andersen: That is all. May the witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Andersen: I call Mr. Hoover.

CLAUDE HOOVER

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

(Testimony of Claude Hoover.)

Direct Examination

Q. (By Mr. Andersen): Will you state your name, please?

A. Claude Hoover. [143]

Q. What is your occupation?

A. Contractor.

Q. Were you an officer of the King-Hoover Construction Company during 1950 and 1951?

A. Yes, sir.

Q. And at that time, did you enter into, as an agent of the corporation, an agreement with Mr. Willis through his agent, Mr. Monsees?

A. Yes, sir.

Q. I hand you here Plaintiffs' Exhibit Number 1 in evidence, and ask you if the last page of that contains your signature? A. Yes, sir.

Q. Was it your understanding of this agreement, Mr. Hoover, that the proceeds from the job at Flagstaff, Arizona, would be security for the advancement of the \$50,000 named in that agreement?

A. Give me that question again.

Mr. Andersen: Read it, please.

(The pending question was read by the Reporter.)

A. (By the Witness): Yes, sir.

Q. (By Mr. Andersen): Your answer is yes?

A. Yes.

Q. Do you know where the books and records of the King-Hoover Construction Company are for the period 1950 and 1951?

(Testimony of Claude Hoover.)

A. Well, the King-Hoover Construction Company finally folded. There was a lady that kept the books for us, I mean, just kept up the payroll, and stuff like that.

Now, she has some of those books, and last night I looked for those in what little time I had, when I found out what the deal was, and I brought all that I could find, and whether or not there are some more at her place, and she since then got married, I don't know where she is, so I don't know that. I can tell you the last I knew of them, they were in Kent Pomeroy's office, and he tells me they are no longer there, so they are some place and I can't tell you right this minute.

I brought everything I could find last night.

Q. Thank you. And do you know where there is a copy of a contract between the King-Hoover Construction Company and the United States Army for the construction of this job at Bellmont, Arizona, which this lawsuit is concerned about?

A. Well, that contract is in one of the files of what I was talking about, with this Mrs. Bailey at the [145] time. There is a copy of that contract at the Navy Ordnance Depot in Flagstaff.

Q. That is the only copy that you know the whereabouts of?

A. Yes, sir, that is right.

Q. Mr. Hoover, could you just tell the Court here what activities in regard to this construction job Mr. Lowell Monsees carried on here?

A. Well, during the course of this project, it

(Testimony of Claude Hoover.)

was by agreement that Mr. Monsees was to come up to Flagstaff and make monthly inspections of the project, and he was to sign all checks, they would be co-signers on all checks to pay for materials, and that, and on the labor payroll. We made the labor payroll, but we were reimbursed weekly by a check from the Railroad Project into the King-Hoover account.

Q. When you say a check from the Railroad Project, you are talking about this bank account out of which funds could only be drawn over the signature of Mr. Monsees?

A. No, it could only be drawn over the signature of Mr. Monsees, and either Mr. King or myself. There had to be two signatures on the check.

Q. One of those had to be Mr. Monsees' signature?

A. Yes, sir. [146]

Q. Anything else that Mr. Monsees did regarding this job that you could tell the Court?

A. Well, I think that what I said pretty well covered it, except when we finally did get in dire circumstances, why, we had a lien, or an attachment on our bank account filed against us, and in order to finally keep going and finish that project, Mr. Monsees carried the remainder out of his account.

Q. His personal account?

A. His personal account, to help us get the things over the hill.

Q. Were the proceeds from this job all placed in this Railroad Project bank account, or in Mr. Monsees' personal account?

(Testimony of Claude Hoover.)

A. They were, after some date in July. I don't know. As I recall, our bank account was attached sometime in the forepart of July. I don't know. Right after the fourth, as I remember, and from that time on through September, why, Mr. Monsees gave us the money out of his account, and we gave him the check when it came in.

Q. Did you keep the payroll records of the Railroad Project separate from those of the other jobs of King-Hoover Construction Company?

A. Yes, sir, we made separate time cards always on the Railroad Project, and then I would advise Mr. Monsees—our [147] pay day was usually on Wednesday, always on Wednesday of the following week, and I would advise him on Monday, I believe, what our payroll was, and he would get me the money up to Flagstaff, and I would make the payroll.

Mr. Andersen: I believe that is all at this time.

Cross Examination

Q. (By Mr. Stroud): Mr. Hoover, did you at any time give any notes to Mr. Willis for any money that he advanced to you, sir?

A. You mean before the project was completed?

Q. Yes, sir.

A. I don't believe that—I am not sure, but I don't believe Mr. Willis received anything back on his \$50,000 advancement until, I believe, in September.

Q. Do you recall having given Mr. Willis any

(Testimony of Claude Hoover.)

notes either before or after the project was started for the \$50,000 advance that he made to you, sir?

A. We had an agreement prior to the letting of the contract, in order to establish us as bidders on it, we had to have additional financing, and at that time an agreement was drawn up that if we were successful as the bidders, then that there would be a contractual agreement between us.

And after we were awarded the job, we drew up an agreement on more or less of a joint adventure basis.

Q. That was the agreement by which Mr. Willis loaned [148] you the \$50,000, was it, sir?

A. Well, he didn't really loan it to us. I mean, he advanced it for the operation of the work.

Q. He was to get the money back, in any eventuality, was he? A. That is right, sir.

Q. He didn't stand to lose any money on the deal, according to the contract, did he?

A. Yes, sir, he did. If the bonding company had to finish the job, he did.

Q. Let me ask you this. Didn't the King-Hoover Construction Company, as well as yourself, personally, and Mr. King, guarantee to personally repay the loan? A. Yes, sir.

Q. To Mr. Willis, that is right, isn't it?

A. Yes, sir, it is right.

Q. Mr. Hoover, have you made any attempt or effort yourself to repay any of this loan to Mr. Willis? A. No. I haven't been able to.

(Testimony of Claude Hoover.)

Q. You say you haven't been able to?

A. No.

Mr. Stroud: That is all. Thank you, sir.

(Witness excused.)

Mr. Andersen: At this time, your Honor, we would like to call attention to some testimony that was given by Mr. [149] Monsees, I think, regarding a lawsuit which had been filed by Mr. Willis against the King-Hoover Construction Company, and Mr. King and Mr. Hoover, personally.

We would like to state, your Honor, that that lawsuit was filed, and it is not our intention to keep that lawsuit hidden from the court, but to make it known, and to stipulate that any proceeds obtained out of that lawsuit, as hopeless as it looks now, would be assigned over to the government, in the event that we succeeded in getting anything out of this lawsuit.

In other words, we don't want to be paid twice. And we just want that known to the Court at this time.

The plaintiff rests, your Honor.

Mr. Stroud: Defendant rests, if your Honor please.

The Court: Do you want to submit briefs on this?

Mr. Andersen: We would be happy to, your Honor.

The Court: How much time would you like? Thirty, thirty, and twenty?

Mr. Stroud: That is fine.

Mr. Andersen: That would be fine, your Honor.

The Court: Very well. Let the record show the case is submitted.

(Which was all of the proceedings had on the hearing of the above entitled matter.) [150]

[Endorsed]: Filed November 2, 1955.

[Endorsed]: No. 14960. United States Court of Appeals for the Ninth Circuit. Wm. P. Stuart, Collector of Internal Revenue for the District of Arizona, Appellant, vs. J. E. Willis and King-Hoover Construction Co., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: December 5, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

IN THE
United States Court of Appeals
For the Ninth Circuit

WM. P. STUART, Collector of Internal Revenue for the
District of Arizona, *Appellant*

v.

J. E. WILLIS AND KING-HOOVER CONSTRUCTION CO.,
Appellees

On Appeal From the Judgment of the United States District
Court for the District of Arizona

BRIEF FOR THE APPELLANT

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FILED

MAR - 5 1958

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 14,960

WM. P. STUART, Collector of Internal Revenue for the
District of Arizona, *Appellant*

v.

J. E. WILLIS AND KING-HOOVER CONSTRUCTION Co.,
Appellees

On Appeal From the Judgment of the United States District
Court for the District of Arizona

BRIEF FOR THE APPELLANT

OPINION BELOW

The court below did not enter an opinion. Its findings of fact and conclusions of law (R. 16-18) are not reported.

JURISDICTION

This appeal involves a suit against William P. Stuart, former Collector of Internal Revenue for the District of Arizona, for recovery of \$8,667.23 alleged to have been erroneously or illegally collected as federal income, withholding and social security taxes

for the fourth quarter of 1950 and the first three quarters of 1951. The amount in issue was collected by distraint on or about November 6, 1951. (R. 4, 7.) The claim for refund on which this action was based was filed on or before January 14, 1952 (R. 5, 8, 17) within the time provided by Section 1636 of the Internal Revenue Code of 1939, and was rejected by the Commissioner of Internal Revenue on or about July 29, 1952 (R. 5, 8). The complaint herein was filed on December 17, 1952 (R. 3-6), within the time provided by Section 3772 of the Internal Revenue Code of 1939. The jurisdiction of the court below seemingly was invoked under 28 U.S.C., Section 1340. The findings of fact, conclusions of law and judgment of the court below were entered on June 8, 1955. (R. 16-19.) Notice of appeal was filed on behalf of the Collector on August 1, 1955. (R. 19.) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the court below lacked jurisdiction of this action because the claim for refund on which it was based was at variance with the complaint.
2. Whether the evidence establishes that a bona fide partnership or joint venture existed between J. E. Willis and King-Hoover Construction Company, plaintiffs below, with respect to the matters here in issue.
3. Whether a purported assignment by King-Hoover Construction Company to J. E. Willis of claims against the United States arising out of a

government contract was valid under Section 3477 of the Revised Statutes.

4. Whether, even if the purported assignment of J. E. Willis was valid, the lien of the United States against the fund in issue for unpaid taxes was prior and superior to the claim of Willis.

5. Whether, in any event, the court below erred in allowing interest on its judgment.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Treasury Regulations are printed in the Appendix, *infra*.

STATEMENT

The findings of fact approved by the court below (R. 16-17) consist mostly of ultimate findings or conclusions with respect to which the Government is taking issue on this appeal. Accordingly, this statement will be limited to pertinent facts with respect to which we feel there will be no dispute and leave controverted facts and conclusions for discussion in the following argument.

Under date of November 16, 1950, a written agreement (Ex. 1, Supp. R.),¹ which is the cornerstone

¹ By inadvertance counsel for the Government, in designating portions of the record on appeal herein to be printed, omitted to designate for printing the documents introduced as exhibits at the trial which it is believed will be helpful in considering the issues raised on this appeal. Accordingly, the Clerk of the Court has been requested to print such exhibits as a supplemental record. However, in order to avoid delay in filing the Government's brief or interfering with the hearing of this case references herein to such documents will be to the supplemental record and appropriate page numbers will be supplied later for insertion.

of this action, was entered into between King-Hoover Construction Company, a corporation, Claude Hoover, as an individual, and Harry C. King, as an individual, as first parties, and J. E. Willis and his wife as second parties, in which it was recited that King-Hoover Construction Company was to bid on and construct, if successful in its bid, a railroad job for the United States Government at Bellemont, Arizona; that Hoover and King, as individuals, were interested that King-Hoover be successful in its bid and construction job; that the first parties were desirous of entering into a joint venture with the second parties in the bid and construction job; and that the second parties were willing to enter into a joint venture with the first parties for the construction of the railroad job and provide the additional financing for the venture. It was therefore agreed, in material part, that in the event King-Hoover were successful in its bid, "first parties and second parties will immediately enter into a joint venture in the construction of said job," and that "Second parties are to provide Fifty Thousand Dollars (\$50,000.00) in additional financing to be used solely by King-Hoover Construction Co. in the said construction project." As consideration for the investment of their \$50,000 the Willises were to receive 8% interest on that amount during the time it was in use in the construction job, or 25% of the net profits from the venture, whichever was greater; that Hoover and King, as individuals, as well as King-Hoover, were to guarantee return of the \$50,000 with a profit to second parties of not less than 8% interest for the time the money was in use; that

Lowell Monsees was to be the agent of the second parties in the joint undertaking and was to have joint control with the first parties over all funds used by the parties in connection with the project and to countersign all checks written in connection with the project; that the \$50,000 was to be used solely and exclusively in connection with the construction job mentioned; and that the \$50,000 was to be returned to the second parties from funds held back by the Government to be paid to King-Hoover upon completion of the job, but that the return of the money was not dependent or contingent upon this source alone.

King-Hoover Construction Company was successful in its bid for the Government railroad construction (referred to in the pleadings and the findings (R. 4, 7, 16), as a railroad rehabilitation job, contract number DA-02-002-AV1-30, Navajo Ordnance Depot, Belmont, Arizona) but the contract is not in evidence and the record does not disclose its terms. No contention has been made, however, that Willis and his wife were parties to the contract.

On the other hand, under date of June 16, 1951, King-Hoover Construction Company, by C. E. Hoover, its president, executed a written document (Ex. 6, Supp. R.) entitled "ASSIGNMENT OF CLAIMS UNDER GOVERNMENT CONTRACT" purporting to assign to Willis and his wife "all monies now due or hereafter to become due from the Sixth Army District Engineers, U. S. Government, under Contract No. DA-02-002-AV1-30 for that certain construction work described as follows" under which it was agreed that the assignees would receive all monies advanced as

a trust fund to be first applied to the payment of claims of laborers, materialmen, subcontractors, and other expenditures arising out of the performance of the contract, and to thereafter credit the balance to the obligation of the assignor to the assignees under the agreement of November 16, 1950, and refund any excess to the assignor.

On or about November 6, 1951, King-Hoover Construction Company became entitled to receive funds in the sum of \$12,278.18 from the United States Government, being the balance due it upon completion of the above railroad rehabilitation contract No. DA-02-002-AV1-30, Navajo Ordnance Depot, Bellemont, Arizona. On or about the same date, November 6, 1951, the Collector levied upon this final payment and applied it to federal taxes previously assessed against King-Hoover Construction Company. (R. 4, 7, 17.) Thereafter the claim for refund on which this action was based was timely filed, and upon its rejection the present action was brought. The claim for refund (Ex. 3, Supp. R.) was filed in the names of J. E. Willis and King-Hoover Construction Company and both parties were named as plaintiffs in this action (R. 3). The court below found that the plaintiffs were partners in a joint venture organization doing business as and under the name and style of King-Hoover Construction Company and J. E. Willis by reason of the terms of the above contract of November 16, 1950; that King-Hoover Construction Company made an assignment of all of its right, title and interest in the proceeds of funds due from the United States under the above railroad rehabilitation

contract by the above assignment of June 16, 1951; that the Collector levied an attachment on the above final payment of \$12,278.18 due under that contract and "out of said sum * * * the amount of \$8667.23 was applied to payroll taxes which were not the obligation of the plaintiffs as a joint venture"; that the obligations of the joint venture were fully paid and discharged; that the sum of \$8,667.23 was due J. E. Willis under the joint venture agreement and King-Hoover, as a member of the joint venture had no right, title, interest or equity in and to such \$8,667.23; and that the plaintiff, J. E. Willis, made a proper claim to the Collector for refund of the \$8,667.23. (R. 16-17.)

The court below further concluded as a matter of law that the agreement of November 16, 1950, created a joint venture between the parties; that the assignment executed by King-Hoover Construction Company under date of June 16, 1951, gave J. E. Willis a lien on the proceeds of the above railroad rehabilitation contract prior and superior to that of the United States with respect to the amount here involved; and that the Collector wrongfully levied upon the proceeds of the contract and wrongfully and illegally applied \$8,667.23 thereof to obligations of King-Hoover Construction Company. (R. 17-18.)

On the basis of these findings and conclusions the court below entered judgment for J. E. Willis in the sum of \$8,667.23 with interest thereon at the rate of 6% from November 6, 1951, until paid (R. 18-19), and the Government appealed (R. 19).

STATEMENT OF POINTS TO BE URGED

The Government relies upon the following errors as a basis for this appeal (R. 21):

1. The trial court erred in holding that it had jurisdiction of this action, since the claim for refund was at a variance with the complaint.

2. The trial court erred in holding that a bona fide partnership existed between Willis and the King-Hoover Construction Company.

3. The court erred in holding that the purported assignment of the corporation to Willis did not violate Section 3477 of the Revised Statutes.

4. The trial court erred in not holding that the Government's tax lien was superior to that of Willis, even if the assignment to Willis be held to be a legal assignment.

SUMMARY OF ARGUMENT

The sum in suit represents a portion of the balance which was due on a construction contract between King-Hoover Construction Company and the United States which in its entirety, we submit, was correctly applied toward the payment of federal payroll taxes assessed against King-Hoover Construction Company. No contention is made that King-Hoover Construction Company did not owe the taxes assessed against it.

The claim for refund here, which we submit differs from the complaint and the theory upon which judgment was rendered, was filed by J. E. Willis and King-Hoover Construction Company as a purported joint venture. The claim asserts an overpayment of

taxes by the joint venture by assuming that a portion of the balance due King-Hoover Construction Company on the construction contract has been applied to the joint venture taxes set up for the first time in a schedule attached. King-Hoover Construction Company disclaims any right to any portion of the asserted overpayment. The purported joint venture also erroneously credits itself as having paid \$6,167.67 which was paid by check toward King-Hoover Construction Company's payroll taxes and credited to King-Hoover Construction Company on May 11, 1951. In addition, there is no showing here that the purported joint venture's taxes were overpaid for there is failure of proof of what amount, if any, of taxes were due from the purported joint venture.

On the other hand, the complaint alleges that plaintiffs became entitled to receive the balance due on the completion of the contract between the United States and King-Hoover Construction Company; and that the Collector levied attachment thereon and applied a portion thereof, the full sum in suit, in payment of payroll taxes which were not the obligation of the purported joint venture. This, we submit, is the basis of the District Court's decision. The court ruled that the Collector applied the sum in suit "to obligations of the King-Hoover Construction Co." The ruling that the sum was illegally so applied is based upon the District Court's holding that a joint venture was created by the agreement between King-Hoover Construction Company and the Willises dated November 16, 1950; and that King-Hoover Construction Com-

pany had validly assigned to the Willises on June 16, 1951, all its right, title and interest in the balance which became due under the government contract in November, 1951. Judgment for a portion of this amount was entered for Willis. No judgment was rendered for King-Hoover Construction Company. The complaint also alleged that the sum in suit was applied to taxes, penalties and interest unlawfully assessed against plaintiffs. But there was no showing of assessments against the plaintiffs as a joint venture; and the record shows that the sum in suit was applied to the payroll taxes of King-Hoover Construction Company alone.

We submit that the agreement between the Willises and King-Hoover Construction Company did not create a joint venture but was a mere loan agreement. King-Hoover Construction Company was to and did perform the construction work, while all that the Willises were to do or did do was to put up the \$50,000 provided therein, and protect it by control of its expenditure through their agent Monsees. The Willises did not put the money they advanced at the risk of the project, but were guaranteed repayment not only by King-Hoover Construction Company but also by King and Hoover as individuals, all of whom also guaranteed payment of 8% per annum thereon; and the provision that the Willises were to receive interest of 8% per annum or 25% of the profits was merely the measure of what the Willises were to receive for the use of their money. In fact, a suit by Willis against King-Hoover Construction Company,

Hoover and King, as individuals, was pending at the time of the trial of this suit.

In any event this contract is not binding on the United States either as a joint venture or as an assignment to Willis by King-Hoover Construction Company of any of its rights under the government contract. The United States entered into the construction contract with King-Hoover Construction Company only. As an assignment of King-Hoover Construction Company's rights under the government contract it was for several reasons void as contra to Section 3477 of the Revised Statutes.

The purported assignment by King-Hoover Construction Company to the Willises of June, 1951, was void as to the United States in that it was in violation of Section 3477 of the Revised Statutes which prohibits assignments of claims against the United States excepting claims which have been determined and allowed. Nor do the Willises come within the exception as to banks, trust companies, and other financial institutions. Further, even an assignment to such a financial institution may not be made to more than one party unless to one party as agent or trustee "for two or more parties *participating in such financing*". (Italics supplied.) The purported assignment here was to a trustee for many parties which did not participate in financing King-Hoover Construction Company's contract.

The District Court also erred in its allowance of interest.

ARGUMENT

I

The Court Below Was Without Jurisdiction of This Action Because It Was Based on Grounds Not Set Forth in the Refund Claim

The provisions of the internal revenue laws relating to the filing of refund claims and suits for refund of amounts paid as internal revenue taxes are available only to taxpayers. And it has long been settled that a court has jurisdiction to entertain a suit for refund only where the complaint is based upon grounds stated in the taxpayer's refund claim, and he has complied strictly with the conditions precedent under which the right to sue has been granted.² In the light of these principles, we submit the court below was without jurisdiction to entertain the present action. J. E. Willis, the only interested plaintiff and the only one to benefit from the court's judgment, was not a taxpayer entitled to the benefit of the applicable provisions of the Internal Revenue Code of 1939,³ and the action was based on grounds not asserted in the refund claim.

The claim for refund upon which this action is based was filed in the names of J. E. Willis and King-Hoover

² See *United States v. Felt & Tarrant Co.*, 284 U.S. 269; *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62; *United States v. Henry Prentiss & Co.*, 288 U.S. 73; *United States v. Factors & Finance Co.*, 288 U.S. 89; *Bemis Bro. Bag Co. v. United States*, 289 U.S. 28; *United States v. Andrews*, 302 U.S. 517; *United States v. Garbutt Oil Co.*, 302 U.S. 528; *Angelus Milling Co. v. Commissioner*, 325 U.S. 293; *Vica Co. v. Commissioner*, 159 F. 2d 148 (C.A. 9th), certiorari denied, 331 U.S. 833; *United States v. Chicago Golf Club*, 84 F. 2d 914 (C. A. 7th).

³ Section 3772(a)(1) of the 1939 Code, and Section 29.322-3 of Treasury Regulations 111. (Appendix, *infra*.)

Construction Company as an alleged joint venture for the refund of an alleged overpayment of social security taxes and withholding taxes. (Ex. 3, Supp. R. .) The claim asserted:

The amount of \$8,667.23 [the full amount claimed] represents an overpayment of taxes by the joint venture, details of which are submitted on attached schedules. The joint venture included only the Railroad Rehabilitation job, Contract number DA-02-002-AV1-30, Navajo Ordnance Depot, Bellmont, Arizona, see joint venture agreement attached.

No part of the \$8,667.23 is claimed by the King-Hoover Construction Co.

This suit was instituted in the names of J. E. Willis and King-Hoover Construction Company, a joint venture. It is alleged in paragraphs II, III and IV of the complaint (R. 4) that there was a balance due plaintiffs for completion of the above railroad rehabilitation job of \$12,278.18 upon which the Collector levied an attachment and applied \$8,667.23 thereof in payment of payroll taxes "which payroll taxes were not the obligation of these plaintiffs as a joint venture"; and that the entire amount of the sum of \$8,667.23 "constitutes assets in which plaintiff, J. E. Willis, has the sole and exclusive equity * * *." Further, plaintiffs allege in paragraph V of the complaint (R. 4-5) that they protested the attachment "of that portion of said funds not applied in payment of obligations of plaintiffs." The answer (paragraphs II, III, IV, V and VI, R. 7-8) denies the allegations of paragraphs II, III, IV, V and VI of the complaint

except that it is admitted that the sum of \$12,278.18 was due King-Hoover Construction Company on the rehabilitation contract, that \$8,667.23 thereof was applied in payment of payroll taxes of King-Hoover Construction Company; and that a claim for refund had been filed and disallowed in its entirety.

It is thus seen that in the claim for refund plaintiffs asserted that there had been an overpayment of taxes of the alleged joint venture,⁴ while it is clear from the complaint as well as from the District Court's findings (R. 16-17) and judgment (R. 18-19) that recovery was sought here by Willis and granted on the ground that the Collector had distrained upon and applied to the payment of taxes admittedly owing by King-Hoover Construction Company money to which Willis asserts a superior claim, not as a tax-

⁴ It is to be noted, as will appear *infra*, Willis was not a party to the government contract (R. 87); that all returns that were filed of payroll taxes were filed by King-Hoover Construction Company (R. 46, 112-113); no contention is made and it has not been shown that the alleged joint venture filed any returns for payroll taxes; the alleged joint venture filed no income tax returns (R. 112); all taxes were assessed against King-Hoover Construction Company (R. 45, 124-125); all payments were applied or paid toward the taxes due from King-Hoover Construction Company (R. 18, 127). Yet in making up the unverified schedule to the claim for refund (Ex. 3, admitted only for limited purposes not including correctness of amounts, R. 43-44, 96-97, 103-104), plaintiffs calculated an alleged overpayment of payroll taxes due in connection with the railroad rehabilitation job alone (though King-Hoover Construction Company was performing other jobs during the same period), and from this they deducted a check paid on King-Hoover Construction Company's payroll taxes. The result they treated as a balance of payroll taxes due from the alleged joint venture, which they in turn deducted from the balance due King-Hoover Construction Company under the construction contract (which had been applied to King-Hoover Construction Company's taxes). They then claimed the balance as an overpayment of taxes of the alleged joint venture.

payer, but either under the agreement of November 16, 1950, or the purported assignment of June 16, 1951, both of which will be discussed *infra* more in detail. Thus, there is patent variance between the claim for refund and the complaint. Hence, the court was without jurisdiction of this suit against the Collector. See the cases cited in footnote 2, *supra*.

The instant suit, we submit, is clearly distinguishable from the decision of this Court in *Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F. 2d 709. There, funds were seized by the Collector from a third party. Here, the fund involved was an amount due from the United States to King-Hoover Construction Company. It is admitted that at the time King-Hoover Construction Company owed the Government at least an equal amount in taxes. In such circumstances, the Government certainly was entitled to set off the balance due on the contract against the taxes owed by King-Hoover Construction Company. Cf. *United States v. Winnett*, 165 F. 2d 149 (C.A. 9th). This, in effect, is what was done. In such circumstances, the United States is a necessary party, in fact the only party interested. No attempt has been made to make it a defendant.

II

The Agreement of November 16, 1950, Between Willis and King-Hoover Construction Company, et al. Did Not Create a Joint Venture; But Regardless of Its Effect Between the Parties Thereto, It Was Neither a Joint Venture Nor an Assignment in Any Way Binding Upon the United States

While we submit that the District Court's finding and conclusion (R. 16, 17-18) that the agreement of November 16, 1950 (Ex. 1, Supp. R.), created a

joint venture between the parties is clearly contra to the provisions of the agreement, and finds no support in the record, we also submit that even so assuming *arguendo*, it is of no aid to the plaintiffs either as an assignment or to support a claim for the refund of taxes which were returned by and paid or applied to the account of King-Hoover Construction Company alone. Yet plaintiffs' whole case is based upon this premise.

The contract of November 16, 1950, under which the District Court concluded that the Willises and King-Hoover Construction Company became joint venturers was an anticipatory agreement between King-Hoover Construction Company, a corporation, and Hoover as an individual, and King as an individual, as first parties, and Willis and his wife as second parties. We submit that it is clear that this contract, though it refers to the agreement as a joint venture, was a mere loan agreement with a guarantee of repayment of the principal together with "eight percent (8%) per annum interest" on the sum loaned, or 25% of the net profits, whichever is greater. Cf. *Pierce v. McDonald*, 168 App. Div. 47, 153 N.Y.S. 810.

The instrument recites that the King-Hoover Construction Company is to bid on and construct, if successful in its bid, a railroad job for the United States at Belmont, Arizona; that Hoover and King, as individuals, are interested that the King-Hoover Construction Company be successful in its bid and construction project; that the first parties are desirous of entering into a joint venture with the second parties in the bid and construction "in order to be provided

with additional financing"; and that the second parties are willing to enter into a joint venture with first parties for construction of the job "and provide the additional financing for the said venture."

Under the agreement the Willises were to provide \$50,000 as additional financing "to be used solely by King-Hoover Construction Co. in the said construction" project. As consideration for the investment by the Willises of the \$50,000, they were to receive "eight percent (8%) per annum interest on the said Fifty Thousand Dollars (\$50,000.00) during the time it is used in the joint venture or twenty-five percent (25%) of the net profits from the said venture, whichever is greater."

However, in the instrument it was agreed that Hoover and King, as individuals, as well as King-Hoover Construction Company, "are to guarantee the return of the said Fifty Thousand Dollars (\$50,000.00) * * * with a profit * * * of not less than eight percent (8%) per annum interest" for the time the \$50,000 was used in the project. It was also agreed that Monsees was to be the agent of the Willises "in this joint undertaking and is to have joint control with first parties over all funds used by the parties in connection with this project, and is to countersign all checks written in connection with this project."

In this contract it was also agreed "that the said Fifty Thousand Dollars (\$50,000.00) is to be returned to second parties from funds held back by the United States Government to be paid to King-Hoover Construction Co. upon the completion of the said job. It is agreed, however, that the return to the second parties

of the said Fifty Thousand Dollars (\$50,000.00) is not dependent or contingent upon this source alone.”

The provision that Willis was to be paid 8% interest or 25% of net profits was clearly a measure of the amount to be paid for the use of the money advanced by him. Cf. *Chapman v. Dwyer*, 40 F. 2d 468 (C.A. 2d). The parties so treated it.

The testimony of Monsees (R. 47-101), Hoover (R. 143-148), and Pomeroy (R. 101-118) shows the construction work on the government contract was performed solely by King-Hoover Construction Company, the corporation using its own employees and building equipment. The corporation kept the books and records for this job. These books were not produced at trial. However, the testimony of Pomeroy shows that the advance or loan “wasn’t set up as a capital account” for Willis or his wife. (R. 114.) The corporation made all payroll tax returns, including therein such taxes for all of its projects for the entire period covered by the government contract for which the joint venture is asserted (R. 46, 112-113; Ex. 4, Supp. R.) in its own name, and also paid the Arizona State employment taxes (R. 93, 94; Ex. 7, Supp. R.). All assessments for federal payroll taxes were made against King-Hoover Construction Company alone. (R. 45, 124-125.) All payments were applied or made toward the payroll taxes of King-Hoover Construction Company alone. (R. 18, 127.) The unverified schedule later made up to support the claim for refund was admitted for limited purposes only not including its correctness. (R. 103-104.) It cannot be considered as showing

taxes which were due on this project alone, or as evidence that the parties considered they were co-adventurers. It is not contended that any payroll tax returns were filed by the alleged joint venture. Pomeroy testified that to his knowledge no copartnership income tax return was filed. (R. 112.)

But regardless of the effect of the November 16, 1950, agreement between the parties thereto, it was neither a joint venture nor an assignment in any way binding upon the United States. Any rights of Willis would be purely derivative. Cf. *Burnet v. Leininger*, 285 U.S. 136. The contract for the job referred to in the above anticipatory agreement, after its successful bid by King-Hoover Construction Company alone, became number DA-02-002-AVI-30, Navajo Ordnance Depot, Bellmont, Arizona. This contract was entered into between the United States and King-Hoover Construction Company alone. Plaintiffs' counsel stipulated at the trial that Willis "was not a party to the contract, not privy to the contract, and had under that contract no rights or duties." (R. 87.)

It is thus seen that the United States dealt with King-Hoover Construction Company alone. Under its contract with King-Hoover Construction Company alone it owed King-Hoover Construction Company alone \$12,278.18. Thus, any rights acquired by the parties under their agreement are limited to rights between the parties, and not binding in any way upon the United States. Otherwise, this agreement would violate Section 3477 of the Revised Statutes which is discussed next following relative to the assignment of claims against the United States, which it would serve

no purpose to repeat here. Cf. *Dulaney v. Scudder*, 94 Fed. 6 (C.A. 5th).

III

The Purported Assignment by King-Hoover Construction Company to J. E. Willis Was Not Valid Under Section 3477 of the Revised Statutes

The court below also found (R. 16-17) that King-Hoover Construction Company—

made an assignment of all of its right, title and interest in the proceeds of funds due from the United States Government under contract number DA-02-002-AVI-30 Navajo Ordnance Depot, Belmont, Arizona, by assignment dated June 16, 1951.

The court further concluded as a matter of law (R. 18) that the purported assignment of June 16, 1951—

gave the plaintiff J. E. Willis, a lien on the proceeds of that certain contract number DA-02-002-AVI-30 Navajo Ordnance Depot, Belmont, Arizona, prior and superior to that of the United States Government except for the claim of the United States Government for payroll taxes and other deductions growing out of the performance of said contract in the sum of \$3610.95.

The instrument executed by officers of King-Hoover Construction Company under date of June 16, 1951 (Ex. 6, Supp. R.), is entitled "ASSIGNMENT OF CLAIMS UNDER GOVERNMENT CONTRACT", and recites that for value received the corporation "hereby assigns, transfers and sets over unto JOHN E. WILLIS

and EDITH P. WILLIS, his wife, * * * all monies now due or hereinafter to become due from the Sixth Army District Engineers, U. S. Government, under Contract No. DA-02-002-AVI-30 * * *." The agreement provides, however, that:

It is agreed that the Assignees will receive all monies advanced hereunder as a trust fund to be first applied to the payment of claims of laborers, materialmen, subcontractors, and of other expenditures arising out of the performance of said contract that may be now due or due in the future, and to thereafter credit the balance collected pursuant to this assignment to the obligation of the Assignor to the Assignees pursuant to that contract dated November 16, 1950, * * * *and to refund to the Assignor any and all amounts collected pursuant hereto which exceed the just and proper amount due the assignees pursuant to the aforesaid agreement*, after claims of laborers, materialmen and subcontractors have been paid. The Assignor does hereby covenant that it has not heretofore alienated, or assigned said construction contract or any rights or interests therein or thereto. (Italics supplied.)

An assignment of a claim against the United States, in order to be valid, must comply with the law pertaining to such assignments, and we submit the purported assignment of June 16, 1951, was void under Section 3477 of the Revised Statutes, as amended (Appendix, *infra*), and was ineffective to convey any right, title or interest to J. E. Willis in payments due King-Hoover Construction Company under its contract with the Government.

Section 3477 of the Revised Statutes, as amended by the Assignment of Claims Act of 1940, and the Act of May 15, 1951, provides that all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof,—

shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. (Italics supplied.)

The statute was designed to protect the Government from conflicting claims and multiple liability. *Martin v. National Surety Co.*, 300 U.S. 588, 594. It must be strictly complied with, and the record in this case is barren of any evidence of such compliance other than the introduction in evidence of the document executed June 16, 1951, when counsel for plaintiffs stated (R. 60):

If the Court please, we are not too particularly concerned about the force or effect of this, except we introduce it for the purpose of showing the arrangement between these two parties.

The purported assignment here is not limited to an amount ascertained to be due, nor after the allowance of a claim and the issuance of a warrant, but attempts to include sums to become due. The Willises do not come within the classes to which assignment of *sums to become due* is permitted—discussed *infra*. Aside from this, there is no proof of compliance with Section 3477 of the Revised Statutes. The instrument does not recite “the warrant for payment”. There is no showing that a claim of the assignor had been allowed. The certificate of acknowledgment does not show that the “officer * * * read and fully explained the * * * assignment * * * to the person acknowledging the same”, which the statute says “must appear”. There is no showing that it was made in the presence of two attesting witnesses.

The statute provides that the provisions above discussed shall not apply in any case in which the amounts due or to become due from the United States, or from any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more “*are assigned to a bank, trust company, or other financing institution, including any Federal lending agency;*” (italics supplied) provided (in so far as pertinent here): That in the case of a contract entered into after the enactment of the 1940 Act no claim shall be assigned if it arises under a contract which prohibits such assignment; that the assignee file

written notice of the assignment, together with a true copy thereof, with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Certainly the Willises do not come within the provision of a bank, trust company, or other financing institution, or any federal lending agency. Aside from this, there is no showing that contract number DA-02-002-AVI-30 did not prohibit assignment. There is no showing that the assignees complied with any of the enumerated requirements of the statute.

A further proviso of Section 3477 of the Revised Statutes governing assignment to the excepted enumerated financing institutions is that it shall cover all amounts payable under the contract not already paid, and shall not be made to more than one party "except that any such assignment may be made to one party as agent or trustee for two or more parties *participating* in such financing". (Italics supplied.) The document here purports to assign to the Willises all monies then due or thereafter to become due under the contract. However, in the document it is agreed that the assignees will receive all "monies advanced hereunder" as a trust fund to be first applied to the payment of claims of laborers, materialmen, etc., and other expenditures arising out of the performance of the contract then due or "due in the future" and to thereafter credit the balance collected to the obligation of the assignor to the assignees pursuant to the agreement of November 16, 1950, and to refund any excess

to the assignor. (Ex. 6, Supp. R. .) Thus, clearly the attempted assignment violates the statute in that it is an assignment to more than one party, and not an assignment to one party as agent or trustee for two or more parties participating in the financing.

The purported assignment is clearly void as to the United States. The Willises could not have collected from the United States any sum due King-Hoover Construction Company under the contract. Cf. *Dulaney v. Scudder*, 94 Fed. 6 (C.A. 5th). They could not prevent the United States from setting off any such sums due King-Hoover Construction Company against taxes due from King-Hoover Construction Company. This, in effect, is what was done here. The sum involved has never left the United States. It merely took it from one hand and placed it in another. *A fortiori*, the purported assignment cannot be asserted as the basis of a lien which primes the Government's lien for taxes.

In such circumstances the purported assignment cannot be asserted as the basis for a judgment against the Collector who took from the United States for the United States to apply to taxes owed to the United States. Cf. *Stuart v. Chinese Chamber of Commerce of Phoenix*, *supra*.

IV

The Court Below Erred in Holding That Willis Had a Lien Upon the Proceeds of the Government Contract Prior and Superior to That of the United States

It is difficult under any theory to uphold the court's ruling that Willis had a lien on proceeds due King-Hoover Construction Company under the government

contract which amounted to \$8,667.23. The \$50,000 advance called for and made under the agreement of November 16, 1950, plus one-fourth of King-Hoover Construction Company's profits under the government contract, \$6,000 (R. 56), total \$56,000. Of this amount Mr. Willis received \$52,000. (R. 81.) It is thus seen that these figures leave a balance of only \$4,000 due to Willis by King-Hoover Construction Company under this agreement.

Mr. Monsees testified (R. 74): "I had to advance money in addition to what we had originally agreed to advance to get the job completed"; that he loaned an additional amount out of his own funds. (R. 74.) Mr. Monsees advanced out of his own funds in September, 1951, \$7,800. (R. 81.) In arriving at the amount claimed to be due Willis, this sum was treated as an amount covered by the agreement and the purported assignment. There is nothing in the record whatever to disclose that this advance of Monsees was covered by either, other than the testimony of Monsees that he got it back from Mr. Willis. The purported assignment merely provides for a credit of any sums collected thereunder "to the Assignees pursuant to that contract dated November 16, 1950". (Ex. 6, Supp. R. .) It thus appears that even if it be assumed *arguendo* that the agreement and assignment are effective as against the United States, Willis' lien could not have been upon an amount in excess of \$4,000—\$56,000 less the \$52,000 returned to him by King-Hoover Construction Company.

We submit, however, that it has been demonstrated *supra*, under points II and III, that neither the agree-

ment nor the assignment, even if effective between the parties, was effective against the United States; that the United States was entitled to set off the sum due King-Hoover Construction Company against the taxes owed by King-Hoover Construction Company.

V

The Court Below Erred in Its Allowance of Interest on the Judgment Entered

28 U.S.C., Section 2411(a), provides that in any judgment against the United States or Collector of Internal Revenue for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6% per annum upon the amount of the overpayment from the date of payment or collection "to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." Subsection (b) of Section 2411 provides that except as otherwise provided in subsection (a), on all final judgments rendered against the United States in actions instituted under Section 1346 of 28 U.S.C., interest shall be computed at the rate of 4% per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

Here, the District Court rendered judgment "together with interest thereon at the rate of 6% per annum from the 6th day of November, 1951, until paid". (R. 18-19.) Thus, the judgment as to interest would be wrong even if it were a judgment for an overpayment of taxes. As stated above, the court in its Conclusion of Law 3 (R. 18) ruled that the sum

in suit had been illegally applied to obligations of King-Hoover Construction Company. No contention is made that the taxes of King-Hoover Construction Company were overpaid; and, as has been demonstrated *supra*, the judgment here is based upon the court's ruling that the purported assignment of King-Hoover Construction Company to Willis gave Willis a lien on the proceeds of the government contract. (Conclusion of Law 2, R. 18.) In other words, it is clear that the court has ruled that the Government has applied a fund upon which Willis had a lien to the taxes of King-Hoover Construction Company. This is not a ruling that taxes of the purported joint venture were overpaid.

CONCLUSION

For the reasons stated above we submit the judgment of the District Court was wrong. It should be reversed and the cause remanded to the District Court with directions to dismiss the complaint, with costs to the plaintiffs.

Respectfully submitted,

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MARCH, 1956.

APPENDIX**Internal Revenue Code of 1939:****SEC. 181. PARTNERSHIP NOT TAXABLE.**

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 187. PARTNERSHIP RETURNS.

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

(26 U.S.C. 1952 ed., Sec. 187.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798].
VALIDITY AGAINST MORTGAGEES, PLEDGEES,
PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of

the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * *

(26 U.S.C. 1952 ed., Sec. 3772.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) *Partnership and Partner.*—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning

of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

REVISED STATUTES [As amended by Section 1, Assignment of Claims Act of 1940, c. 779, 54 Stat. 1029, and the Act of May 15, 1951, c. 75, 65 Stat. 41):

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from

any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided*,

1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

* * * * *

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer of the head of his department, or agency (b) the surety or sureties upon the bond or bonds if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

* * * * *

(31 U.S.C. 1952 ed., Sec. 203.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.322-3 [As amended by T.D. 5325, 1944 Cum. Bull. 152, 153; T.D. 5425, 1945 Cum. Bull. 10, 38; T.D. 5680, 1949-1 Cum. Bull. 126; and T.D. 5772, 1950-1 Cum. Bull. 117]. *Claims for Refund*

by Taxpayers.—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or short Form 1040A, or by the use of Form W-2 (Rev.), or Employee's Optional Form 1040A, or an amended return, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

* * * The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. * * *

IN THE
United States Court of Appeals
For the Ninth Circuit

WM. P. STUART, Collector of Internal Revenue
for the District of Arizona, *Appellant*,

vs.

J. E. WILLIS AND KING-HOOVER CONSTRUCTION Co.,
Appellees,

On Appeal From the Judgment of the United States District
Court for the District of Arizona

ANSWERING BRIEF FOR THE APPELLEES

FILED

APR 23 1956

PAUL P. O'BRIEN, CLERK

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IN THE
**United States Court of Appeals
For the Ninth Circuit**

No. 14,960

WM P. STUART, Collector of Internal Revenue
for the District of Arizona, *Appellant*,

vs.

J. E. WILLIS AND KING-HOOVER CONSTRUCTION Co.,
Appellees

ANSWERING BRIEF FOR THE APPELLEES

JURISDICTION

The suit in the District Court was filed by plaintiffs December 17, 1952 (R. 3-6) seeking to recover \$8,667.23 of their funds which the Collector had seized and applied in payment of liabilities not owing by said plaintiffs (R. 4-5.)

A claim for refund seeking the return of these same funds had been filed by plaintiffs on the 26th day of December, 1951, (R. 5, 17 and Ex. 3) and had been denied by the Collector by letter dated the 29th day of July, 1952. (R. 5,8).

The court below took jurisdiction under 28 U. S. C. 1340 which reads in part, "The District Courts shall have original jurisdiction of any civil action arising

under any act of Congress providing for internal revenue.”

28 U. S. C. 1291 provides this court with jurisdiction on appeal.

STATEMENT OF THE CASE

The basic question here involved is whether the Collector should be permitted to seize funds earned by and due to a joint venture and apply a portion of such funds in payment of the separate tax liability of one of the joint venturers.

Appellant in his appeal is asking this court to upset a finding of fact by the District Court that such a joint venture existed and to find instead that Willis was a mere creditor rather than a partner.

Proceeding from the premise that these were not joint venture funds which were seized, appellant next asks this court to rule that the Assignment of Claims Act of 1940* prohibits Willis from obtaining any interest in the funds here in question superior to that asserted by himself.

Other assignments of error raised by appellant assert (a) lack of jurisdiction by the trial court due to an alleged variance between the claim for refund and the complaint, and (b) a question about the amount of interest on the judgment.

*The assignment of claims Act of 1940, 26 U.S.C. 3797, is set out in Appellant's brief (pp. 33-34) and for the sake of brevity will not be duplicated herein.

Appellant's brief contains a statement of facts, which by his own admission is, " limited to pertinent facts with respect to which we feel there will be no dispute" Brief p. 3). Much of his brief is devoted to an attack on other specific findings of fact by the court below which he regards as still in dispute. We desire to have before this court a statement which recognizes these specific findings.

The fact situation is not complicated. On November 16, 1950, John E. and Edith P. Willis (hereinafter called Willis) and the King-Hoover Construction Company (hereinafter referred to as the Company) entered into a joint venture agreement (Ex. 1). The Company was in a preferred position to obtain a desirable construction contract with the government, but lacked the necessary funds. By this agreement Willis obligated himself to provide \$50,000.00 in cash if the company would obtain the contract. It was agreed that the profits would be divided in a ratio of 75% to the Company and only 25% to Willis, but the Company and its officers pledged themselves to see that Willis did not suffer any losses and in any event Willis was to receive a minimum return of 8% per annum on his investment. In addition thereto, it was provided that the \$50,000.00 invested by Willis would be returned to him from the proceeds of the government contract (Ex. 1).

~~Willis did not suffer any losses and in any event Willis was to receive a minimum return of 8% per annum on his investment. In addition thereto, it was provided that the \$50,000.00 invested by Willis would be returned to him from the proceeds of the government contract (Ex. 1).~~

The company bid on and obtained the contract. Willis

advanced the \$50,000.00 and later had to advance an additional \$7,800.00 to keep the project going (R. 82).

On June 16, 1951, Willis, in order to further insure himself against loss of his investment, obtained from the company a formal assignment (Ex. 6) of all amounts due or to become due under the government contract.

While this contract was being completed, the company became indebted to the Collector for payroll taxes on other jobs which it was doing which were not in any way related to the joint venture contract. During the months of July, August and October, 1951, the Collector filed liens against the company for these unpaid taxes.

On November 6, 1951, the joint venture contract was satisfactorily completed and the venture became entitled to receive the final payment in the sum of \$12,278.18. On this date the collector seized the funds and applied them as follows:

In payment of payroll taxes owed by the joint venture	\$ 3610.95
In payment of payroll taxes owed by The King-Hoover Construction Com- pany	8667.23
Total	\$ 12278.18

The joint venture filed a claim for a refund of the \$8667.23 which the Collector had applied in payment of King-Hoover's separate liability, and by means of some 8 supporting schedules (Ex. 3) set forth in detail the facts surrounding their claim. The claim was denied by the collector by letter on July 29, 1952, and this suit was filed in the District Court on December 17, 1952, by the joint venturers.

The complaint prayed for return of the \$8667.23 together with interest at the rate of 6% per annum from November 6, 1951.

The trial court gave judgment for plaintiffs in accordance with the prayer of their complaint and the collector brought this appeal.

SUMMARY OF THE ARGUMENT

Appellant's assertion of lack of jurisdiction ignores the fact that both the claim for refund and the complaint set forth in detail all basic facts which were necessary for a determination of the case and both ask for identical relief. It appears that appellant refuses to recognize the existence of the joint venture and their right to assert claim to property improperly seized. Appellant raised this question for the first time after the trial in the lower court and therefore the trial court could not inquire into the matter.

The second assignment charges the court below with error in finding a joint venture existed. This, we believe, flies directly in the face of overwhelming evidence. Both the document creating the relationship, and the activities of the members of the venture in jointly carrying the government contract to completion, show a joint undertaking and a community of interest in the profits. The proceeds from the contract were the joint venture funds which the Collector seized and applied in payment of the separate liability of one of the partners. The trial court held this to be error and decreed that they should be returned. The trial court specified, on the evidence presented, which member of the venture was entitled to receive the funds, i.e. J. E. Willis. This was within the scope of the

court's inquiry since the complaint prayed for such relief.

The third and fourth assignments of error discuss the relative lien rights of the Collector and Willis, assuming that no joint venture existed.

We assume that even in the absence of a joint venture, Willis had a superior lien. The undisputed evidence shows that his lien was prior in time. The Assignment of Claims Act of 1940 was enacted to protect the government from multiple claims just as appellant alleges. However, this Act should not be construed to give the Collector additional lien rights. The problems which this legislation was enacted to solve are not present here. No one made any assignment to the Collector and the only other parties here involved are joined as plaintiffs.

Not only this, but the Collector is asserting a lien on \$5489.59 of the funds here involved in payment of a debt which did not even exist at the time the funds were seized.

The problem relating to interest will be discussed later.

ARGUMENT

I.

There was no evidence submitted to the trial court calculated to either prove or disprove appellant's challenge of jurisdiction.

Whether a fatal variance exists between the claim for refund and the complaint would ~~not~~ appear to depend

upon whether the claim and the complaint both lead to an investigation of the same fact situation and both request the same type of relief based upon those facts.

Appellant has cited some ten cases as authority supporting his contention of variance (Br. P. 12). The decision in one of these cases, *Bemis Bros. Bag Co. v. United States*, 289 U. S. 28 was against the Collector. In still another of the cases cited, the court reviewed its prior decisions (a number of which are cited by appellant) and then made the following observation:

“Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which makes more definite the matters already within his knowledge, or which in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.” *United States vs. Andrews*, 302 U. S. 517, 524.

It appears to us that appellant is asking this court to apply the rules regarding variance in such a manner as to require the complaint to employ exactly the same words and phraseology as that of the claim for refund. The cases appellant cites do not support his theory.

We point out that the claim for refund (Ex. 3) is rather detailed and has attached thereto 8 supporting schedules which set forth the relationship of the par-

ties, a summary of their financial dealings, the nature of the claim and the amount thereof. The first schedule makes reference to the "Amount held by the Levy," and thereby explains the reason for the "overpayment."

Exhibit 8 in evidence is a letter to the Collector written by the accountants for the joint venture and contains additional information requested by the Collector as the first sentence thereof indicates. The Collector was made fully aware of all facts bearing upon the claim for refund.

If there is any fact of importance, relative to the claim which was omitted, we fail to see it. The complaint sets forth exactly the same fact situation, describes the relationship of the parties and points out that Willis is the member of the joint venture to whom the funds being sued for belong. Both the claim and the complaint spell out that appellant seized funds belonging to the joint venture and \$8667.23 thereof was applied in payment of obligations owed solely by King-Hoover. Both recognize the indebtedness of the joint venture for \$3610.96 (a portion of the \$12,278.18) as being properly applicable against payroll taxes to be paid by the joint venture. Appellant seems to forget this when he makes the statement that ". . . . Willis asserts a prior claim, not as a taxpayer" (Br. P. 14, 15).

We see no fact situation in any of the cases cited by appellant analagous to those here and we find in them no authority for denying jurisdiction to the trial court.

II.

In his second assignment of error, appellant has attacked a specific finding of fact of the trial court

that a joint venture existed and has asked this court to review the finding.

This court has stated its position with regard to the reviewability of fact finding by a trial court in the following words:

“Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence, the findings should have been different.” *Ocean Accident & Guaranty Corporation v. Rubin*, 73 F. (2d) 157, 163 (C.C.A. 9th) (Quoting from *Stanly vs. Supervisors*, 121 U. S. 547).

Appellant in his brief blandly states that this finding that a joint venture existed between the parties “ is clearly contra to the provisions of the agreement and finds no support in the record” Br. P. 16). Such a charge that the trial judge’s findings were completely baseless is rather serious.

While we hesitate to impose upon this court by entering into a consideration of the rather voluminous evidence bearing upon this point, we deem it necessary to refute appellant’s statement and refer this court to a few items in the record showing that the trial court had adequate reasons for reaching its conclusion.

Possibly the most compelling evidence that a joint venture existed between Willis and King-Hoover Construction Co. is Plaintiff’s Exhibit I in evidence.

This is the agreement which formed the basis for the relationship. The document uses the term “Joint Venture” no less than six times in describing the arrangement between the parties. The term “Joint undertak-

ing” is used once and the single word “venture” is used twice. Clearly the parties understood from the beginning that they were engaged in a joint venture.

The principal terms of the agreement are referred to in our statement of facts. We discuss other terms herewith. The company and the two officers of the company all pledged their personal credit, for what it was worth, that Willis would get his capital returned intact plus a profit of 8% per annum minimum. An additional guarantee that Willis would not lose his investment appears in paragraph 14 which gives Willis a prior claim on the proceeds from the government to the extent of his \$50,000.00 investment.

Willis was doing everything possible to protect his investment. He was sacrificing a possibility of making more money, in order to obtain security, since he stood to earn only 25% of the profits made. However, he was not free from risk or loss. Claude Hoover, one of the officers of the company, while testifying under cross examination was asked “Q. He (Willis) didn’t stand to lose any money on the deal, according to the contract, did he. A. Yes, sir, he did. If the bonding company had to finish the job, he did.” (R. 147).

Because of the security measures taken, appellant characterizes the arrangement as “a mere loan agreement” and cites the case of *Chapman vs. Dwyer*, 40 Fed. 468, in support of his statement.

That case discussed the tests to be applied in determining the existence of a joint venture and stated: “. . . . there must be understanding, express or implied, that each shall share in the profits as such so that each has an equitable interest in the profits themselves.” Id. p. 471. We refer the court to the remain-

der of the opinion on the same page which cites other cases for the proposition that the tests of a joint venture are a proprietary interest in the profits and a joint undertaking.

In further refutation of the statement that this was a "mere loan agreement" we refer to other terms of the agreement which provide that:

(a) The job was to be bonded and the profit was to be computed according to accepted accounting practices (P. 9).

(b) The joint venture agreement was to cover any extensions or additions to the contract (P. 11).

(c) Lowell Monsees, agent of Willis, was to have joint control over all funds used in connection with the project and was to countersign all checks (P. 12).

(d) The \$50,000.00 contributed by Willis was to be used exclusively on the joint venture (P. 8).

All of the above terms point to a joint venture rather than a relationship of debtor and creditor.

A joint venture as defined by the Internal Revenue Code is a partnership ". . . . through or by means of which any business, financial operation, or venture is carried on, and which is not within the meaning of this title, a trust, or estate, or corporation." I. R. C. (1939) Sec. 3797 (a) (2).

The definition of a partnership has been laid down by the Supreme Court and cited by the Tax Court as follows:

"The requisites of a partnership are that the parties have joined together to carry on a trade or

adventure for their common benefit, each contributing property or services and having a community of interest in the profits.”

Howard Coombs, 20 BT A 1021, 1024, quoting from *Meehan vs. Valentine*, 145 U. S. 611, 618.

The essential elements are: A joint undertaking, contribution of property or services, and a community interest in the profits. The evidence of the case shows all three to be present and completely justifies the trial court in its finding.

Since a joint venture existed, the proceeds from the contract levied on by the Collector were funds owned by the joint venture. It is elementary law that a creditor of a partner may not proceed against a partnership property but must proceed against the partnership interest of the partner. 68 C. J. S. 695, and cases there cited.

Does the fact that the Collector is involved here as a creditor of one of the partners take this case out of the general rule?

Appellant so contends in his brief, (p. 15) and cites the case of *United States vs. Winnett*, 165 F. (2) 149 (C. A. 9) in support of his position.

Our reading of that case does not bring us to the same conclusion. The facts of that case show that Winnett borrowed \$60,000.00 from Summers on his personal note and then later endorsed certain notes for Summers' benefit on which the latter was primarily liable. A written agreement between the two provided that if Winnett ever had to pay any of the endorsed notes due to Summers' default, he would be able to off-

set such payments against his \$60,000.00 note to Summers. Winnett was specifically relying on his right of off-set when the loan was made.

When the collector in seeking to collect taxes owed by Summers, tried to enforce against Winnett the \$60,000.00 note which he owed Summers, this court granted Winnett his right of offset.

Those facts are distinctly different from the case at bar. Surely appellant will not contend that the government had offset in mind when the contract was let to King-Hoover Construction Co. The agreement about the proceeds of the contract was between Willis and King-Hoover and not between the government and King-Hoover. Before leaving this case, we quote from the decision as follows:

“Under S. S. 3672 and 3710 (a) of the Internal Revenue Code, the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon.” *United States vs. Winnett* 165 F (2d) 149, 151.

This principle is widely recognized and the law has been well established that the rights of the Collector rise—

“No higher than those of the taxpayer whose right to property is sought to be levied on.” *F. H. McGraw & Co. vs. Sherman Plastering Co., Inc., et al*, 60 Fed. Supp. 504, 512.

A famous authority in the field of taxation has stated that:

“The property of one person may not, however, be subjected to distraint to enforce the tax liability of another person.” (citing cases.)

Merten's Law of Federal Income Taxation (1942-9th ed.) Vol. 9 P. 137.

On page 138 of the same volume, Mr. Merten states that:

“While a partnership checking account in a bank is not subject to distraint to satisfy a tax assessed against an individual partner, the government's tax lien does attach to the taxpayer's interest in the partnership itself”

Defendant violated this basic law since the joint venture funds of \$8667.23 were seized and applied in payment of a tax liability of King-Hoover Construction Co. *Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 Fed. 709.

In discussing whether or not a joint venture existed, appellant sees in the failure of this organization to file certain tax reports a grave defect.

Aside from the fact that such a failure would have no bearing upon this matter if a joint venture actually existed we make the following observation.

The same employees here involved worked for both the joint venture and the King-Hoover Construction Co. Had two different payroll reports been prepared, there would have been an overpayment of payroll taxes for all employees who earned more than \$3,000.00 during a calendar year from these two sources. Under the arrangement made, when the total earnings of an employee from the two sources reached the maximum salary upon which the taxes were assessed, no further employment security taxes or F.I.C.A. taxes were assessed and paid.

The government was certainly not damaged by this sensible arrangement and it saved an immense amount of paper work for the government, the joint venture and the employees who would have had to file claims for refund.

III.

Appellant's third point upon which he relies states that the purported assignment by King-Hoover Construction Company to J. E. Willis was not valid under Section 3477 of the Revised Statutes.

We defer consideration of said Section 3477 for a moment and point out that the original joint venture agreement (Ex. 1, paragraph 14) contains this statement:

“It is further agreed that the said \$50,000 is to be returned to second parties from funds held back by the United States Government to be paid to King-Hoover Construction Company upon completion of said job.”

Assuming, without admitting, that the proceeds of the contract were not funds owned by the joint venture, we submit that this provision would have at least created a lien similar to that which has been recognized by the courts in the so-called “surety” cases. In these cases a contractor, in securing a bond from a surety company assigns all or a portion of the contract proceeds to the surety to secure the latter against any loss arising out of the execution of the bond. Such a provision is held to give to the surety an equitable lien to such proceeds superior to the lien of the Collector of Internal Revenue. *Glenn v. American Surety Co., et al*, 160 Fed.

977 (C.A. 6, 1947). *United States Fidelity and Guaranty Co. v. Triborough Bridge Authority* (N.Y. 1947) 74 N.E. 2d 226. *In re Van Winkle* 94 Fed. Supp. 711, Cf. *National Surety Co. vs. County Board of Education of McDowell Co. et al* 15 F. (2) 993 (C.A. 4).

In determining to what property interest a collector's lien for taxes attaches, the court refers to the laws of the state wherein such a property right exists. *Metropolitan Life Ins. Co. vs. United States* 107 F. (2) 311 (C.A. 6).

The joint venture agreement here involved was entered into in the State of Arizona and the contract performed therein. Under the decisions of the Supreme Court of that state, Willis would have an effective lien on the proceeds from the contract since the parties so intended. *Allen v. Hammon Lumber Co.*, 34 P. 2d 397, 44 Ariz. 145, *Barnes v. Shattuck*, 114 P. 952, 13 Ariz. 338.

It might again be asked whether a right of offset existed which would subordinate the lienor's rights to those asserted by the Collector. The Court of Claims discussed this matter in the case of *Seaboard Surety Co. vs. United States*, 67 F. Supp. 969, and on page 971 the court says:

"The right of the Government to preference or priority in payment of debts due it is purely statutory The United States possesses the general as well as the statutory right, R. S. 236, 31 USCA Sec. 71, to supply any sum due by it to the extinguishment, in whole or in part, of any debt due to the United States on any other account by a person to whom the United States is indebted, but this is only the exercise of the common right

which belongs to every creditor to apply the unappropriated monies of his debtor, in his hands in the the extinguishment of the debts due to him. *Gratiot v. United States*, 16 Pet. 336, 10 L. Ed. 759. The right of offset does not give the Government a superior legal or equitable claim to the funds in its hands”

It is noted that in the case cited, the Collector was given priority; however a special statutory right arose there due to a “legal and known insolvency manifested by some notorious act of the debtor pursuant to law.”
Id. P. 971.

No similar reason exists for preferring the Collector in the present case.

Appellant has spent some time in his brief discussing the “Assignment of Claims Act of 1940.” His conclusion is that the assignment of claims under government contract (Ex. 6) executed by King-Hoover Construction Company to the Willises is ineffectual due to the provisions of said statute.

He has cited *Martin vs. National Surety Co.*, 300 U.S. 588, 594 in support of his statement that “The statute was designed to protect the Government from conflicting claims and multiple liability.” (Br. P. 22). We agree. But appellant is here trying to use the statute, not as a shield, but as a sword. He is trying to bring into existence a substantive right in himself to the funds here involved. The cases interpreting this act have limited its effect to the purposes it was enacted to accomplish. *Thompson vs. Commissioner of Internal Revenue*, 205 F. (2) 73 (C.A. 3), *Hobbs vs. McLean*, 117 U.S. 567.

Even in the case cited by appellant the court there refused to go along with the “advocates of literalism” and stated that “The purpose of the statute was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.” *Hobbs vs. McLean*, Supra. Id. P. 595.

The court goes on to make this observation:

“An assignment ineffective at law may nonetheless amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice.” Id. P. 597.

In the Martin case, a contractor assigned the proceeds from the government contract to his surety and then later gave a creditor his power of attorney to collect the same funds from the government. Under this power of attorney, the creditor actually collected the funds, but the Supreme Court forced the creditor to surrender them in favor of the surety and certain materialmen claiming under the surety.

Even ignoring the joint venture aspect in the case at bar, the Martin case should be good authority for allowing Willis to recover here.

We submit that the statute was never designed to add another weapon to the collector’s arsenal and thereby give him additional and superior lien rights which the statutes dealing with lien rights have failed to provide.

We further submit that even though a joint venture had not been formed, Willis had superior lien rights

to those of the Collector's, not only by virtue of the assignment of claim dated June 16, 1951, (Ex. 6) but also by reason of the joint venture agreement itself (Ex. 1) wherein the proceeds from the contract were assigned to Willis.

The Collector's lien did not arise until July 13, 1951, and thereafter, as the following summary taken from the assessment lists (Ex. 11) shows:

Assmt. List Page No.	Taxes for Quarter Ending	Type of Taxes	Date lien Filed	Amount Applied in Payment	Date of Payment
547	3/31/51	Withholding & FICA	7/13/51	\$ 1114.75	11/6/51
39010	6/30/51	"	8/28/51	2388.64	11/6/51
39010	9/31/51	"	10/19/51	3285.20	11/6/51
2	Yr. 1951	FUTA Col. ltr.	10/5/51	5489.59	11/6/51
Total				<hr/> \$12278.18	

We point out from the above schedule that the Collector seized funds on November 6, 1951, and applied \$5489.49 thereof in payment of a liability for Federal Unemployment taxes for the year 1951. These taxes were not due and payable until January, 1952, and so we find appellant here asserting a lien on, and attaching funds in payment of a liability not even in existence at the time.

IV.

In discussing his fourth assignment of error, appellant does not discuss lien rights but again raises a question of fact. He again refuses to accept those facts found by the trial court to exist, i.e., that Willis was entitled to \$8667.23. (R. 17—Fact #5). He refers to testimony on pages 74 and 81 of the record and mis-

interprets it. Under cross-examination Mr. Willis tried to explain to the appellant's attorney that an additional \$7800.00 had to be invested in the project by Willis to keep it going. The attorney refused to place in evidence the written account of the advances and repayments which was available (R. 84). We refer appellant to the record, pages 81 - 84 and to Exhibit 3, Sch. 6 for a clarification of the matter.

V.

Appellant's Fifth assignment of error states that the court below erred in its allowance of interest.

We do not object to an alteration of the judgment so that interest is awarded to the rate of 6% from the 6th day of November, 1951, "to a date preceding the date of the refund check by not more than 30 days." (Br. P. 27). We should assume that the Collector would read such a term into the judgment when making the check.

In the other point raised under this assignment, appellant still refuses to accept the finding of the court below that the \$12,278.18 seized by the Collector belonged to the joint venture (R. 17, Fact #3) and that of this sum \$8667.23 was applied in payment of obligations not owing by the venture (R. 17, Fact #3).

Appellant's insistence that the court did not rule " that taxes of the purported joint venture were overpaid" (Br. P. 28) seems to us to ignore the fact, that throughout this case, plaintiffs have admitted their liability for payroll taxes in the sum of \$3610.95, and the court has clearly recognized this in its rulings.

We cannot agree that the rate of interest should be reduced to 4% merely because the Collector applied these funds in payment of the wrong liability. The Collector was well aware of the interest of Willis in these funds before they were seized. (R. 36, 37).

CONCLUSION

It is submitted that if appellant's viewpoint of this matter were accepted, no one would be safe in forming a partnership or joint venture for the purpose of performing services for the government. The risk would always threaten that the Collector could step in, despite all safeguards, and seize funds due the venture and apply them in payment of tax liability of either partner for bygone years.

We cannot believe that Congress intended such a result. Surely the Collector should not be permitted to step in at the last moment and seize not only the fruits of risk and labor but the very investment by which the funds arose.

Appellant's contention seems to be that the Assignment of Claims Act of 1940 should be interpreted so that there was absolutely nothing which Willis could have done to protect himself from the Collector's long arm. We do not believe that anyone, even the Collector, should be given the power to divest an investor of his property rights in this manner.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

SANTOS CUADRA, Appellant,
vs.

QUEEN FISHERIES, INC., a corporation, and
E. H. BENDIKSEN, doing business as E. H.
Bendiksen Co., Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

FEB 23 1956

PAUL P. O'BRIEN, CLERK



No. 14969

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In the District Court of the United States, Western
District of Washington, Northern Division

Civil Action No. 3753

SANTOS CUADRA, Plaintiff,

vs.

QUEEN FISHERIES, INC., a corporation; and,
E. H. BENDIKSEN, dba E. H. BENDIK-
SEN CO., Defendants.

COMPLAINT

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees

Comes now the plaintiff and for cause of action
against the defendants, complains and alleges as
follows, to-wit:

I.

That the plaintiff is a resident of Seattle, King
County, State of Washington.

II.

That the defendant corporation is a resident of
Seattle, King County, State of Washington, and
maintains its principal place of business in said
place within the jurisdiction of the above entitled
Court; that the defendant, E. H. Bendiksen, is
now, and at all times hereinafter mentioned, has
been, a resident of King County, Washington,
doing business as E. H. Bendiksen Co., with offices

in the Lyons Building, in Seattle, King County, Washington, and is the owner of all of the capital stock in the defendant corporation, Queen Fisheries, Inc.

III.

That at all times hereinafter mentioned, the defendants were the owners and operators of the motor vessel, Alaska Queen.

IV.

That at all times hereinafter mentioned, the plaintiff was employed on said vessel by the defendants, as a fish butcher and ordinary seaman at the wage rate of \$285.00 per month, together with overtime and maintenance; that at all times hereinafter mentioned said vessel was an American vessel, and the plaintiff became a member of the crew of said vessel; that on the 20th day of July, 1953, while said vessel was in the navigable waters of Bristol Bay, Alaska, near Naknek, plaintiff was ordered and directed by the defendants to show cases of canned salmon aboard a barge moored alongside the said vessel, Alaska Queen; that when the plaintiff boarded said barge, in the course of his duties, as aforesaid, he was grievously injured, as more fully hereinafter set out.

V.

That plaintiff's injuries were solely and proximately caused by reason of the negligence of the

defendants, their agents, servants and employees, in that they failed and neglected to supply the plaintiff with a safe place in which to work; failed to properly superintend and supervise the work going on at the time plaintiff was injured; and, failed to promulgate proper and safe rules for the conduct of said work, and to warn the plaintiff of the impending dangers; that by reason of the foregoing, plaintiff, while using due care and caution on his part, sustained severe and permanent injuries to his left knee and left leg when a floor of plywood dunnage, negligently laid as a flooring in the hold of said barge, suddenly and without warning, gave way and caused plaintiff's injuries herein complained of; that by reason of said injuries, plaintiff has been confined in a hospital; that he has been required by said injuries to have an operation upon his left knee; that he has suffered, and will continue to suffer, great pain, agony and mental anguish; that he has incurred expense for medical and surgical attention and medicines; has lost, and will lose, large sums of money which he otherwise would have earned as wages and the expense of his board and lodging, which he otherwise would have earned; that he has been permanently injured, and will be unable to pursue his usual occupation because of the permanency of his injuries, all to his damage in the sum of \$50,000.00.

Wherefore, Plaintiff prays that he have judgment against the defendants, and each of them, in the

sum of \$50,000.00, together with his costs and disbursements herein to be taxed.

ZABEL & POTH

/s/ By OSCAR A. ZABEL,

Attorneys for Plaintiff

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Cause.]

ANSWER

Come now the defendants and for answer to the complaint of the plaintiff on file herein, admit, deny and allege as follows:

I.

Defendants do not have sufficient information or knowledge relative to the allegations of paragraph I and, therefore, deny the same.

II.

Answering paragraph II, defendants admit the same.

III.

Answering paragraph III, defendants allege that the said vessel, Alaska Queen, was owned and operated by the Queen Fisheries, Inc., and not by E. H. Bendiksen Co.

IV.

Answering paragraph IV, the defendants deny that they employed plaintiff as ordinary seaman, and also deny that plaintiff was a member of the

crew of said vessel. Defendants further deny that plaintiff was injured while aboard said vessel and in navigable waters.

V.

Answering paragraph V, defendants deny each and every allegation therein contained.

Further Answering the complaint of the plaintiff, and by way of a First Affirmative Defense thereto, the defendants allege that if the plaintiff has been injured and/or damaged as in his complaint alleged, or at all, that said injuries and/or damages were solely and proximately caused by and contributed to by the negligence of the plaintiff, and that at the time immediately preceding the accident, he placed himself in a position of obvious danger, when positions of safety were available to him in the course of his work, and that in assuming said dangerous position, he assumed the risk of a perilous situation created by his own act.

Further Answering the complaint of the plaintiff, and by way of a Second Affirmative Defense thereto, the defendants allege that immediately following the injury, the plaintiff was afforded hospitalization, medical treatment and compensation under the terms and provisions of the Workmen's Compensation Act of Alaska; that said compensation and medical treatment amounted to the approximate sum of \$2,240.51.

At Section 43-3-30 of the Workmen's Compensation Act of Alaska in effect at the time of plaintiff's alleged injuries, provides as follows:

“Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against anyone liable to pay compensation under this Act but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid, and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.”

That by reason of the foregoing provision of the Workmen's Compensation Act of Alaska and the election by the plaintiff to receive compensation under said Act, the plaintiff is precluded from suing these defendants and said action should be dismissed.

Further Answering the complaint of the plaintiff and by way of a Third Affirmative Defense thereto, defendants allege that if the plaintiff has been injured and/or damaged as in his complaint alleged, or at all, said injuries were received by the plaintiff while acting as a longshoreman employed on navigable waters of the United States, and his injury was exclusively subject to the provisions of the Longshoremen's and Harbor Workers Act, and that under the terms of said Act, the plaintiff cannot

maintain a suit against his employers, and that by reason thereof this action should be dismissed.

Wherefore, Having fully answered the complaint of the plaintiff, the defendants pray that they may be dismissed, and recover their costs and disbursements herein to be taxed.

SWEET, WOLF & MERRICK,
/s/ H. J. MERRICK,
Attorneys for Defendants

Duly Verified.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of a pretrial conference heretofore had on May 5, 1955, in Room 612 of the U.S. Courthouse, Seattle, Washington, where the Honorable William J. Lindberg presided, the plaintiff being represented by Milton H. Soriano of Zabel & Poth, and the defendants being represented by Joseph Merrick of Sweet, Wolf & Merrick, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

The following are the admitted facts herein:

1. That the plaintiff is a resident of Seattle, King County, Washington.

2. That the defendant, Queen Fisheries, Inc., a domestic corporation, is situated in Seattle, King County, Washington, and maintains its principal place of business in Seattle, King County, Washington, within the jurisdiction of the above entitled Court. That the defendant, E. H. Bendiksen, is a resident of King County, Washington, doing business as E. H. Bendiksen & Company, and that said defendant is the owner of all the capital stock in the defendant corporation, Queen Fisheries, Inc.

3. That at all times, hereinafter mentioned, the defendants were the owners and operators of the motor vessel Alaska Queen.

4. That the plaintiff was hired on said vessel by the defendants as a fish butcher doing miscellaneous jobs on and about said vessel. That the plaintiff was receiving the wage of \$285 per month, together with overtime and maintenance. That the vessel Alaska Queen was an American vessel. That the plaintiff joined said vessel on July 20, 1953, while said vessel was in the navigable waters of Bristol Bay, Alaska, near the Town of Naknek. That the plaintiff was ordered and directed by defendants to stow cases of salmon aboard a barge moored alongside said vessel. That when the plaintiff was on board said barge in the course of his duties, he was injured.

Plaintiff's Contentions

The plaintiff's contentions are as follows:

1. Plaintiff contends that he was a seaman and

crew member of the vessel Alaska Queen and was under the directions, orders and supervision of the master and owner of said vessel.

2. That the plaintiff's injuries were solely and proximately caused by reason of the negligence of the defendants, their agents, servants and employees, in that they failed and neglected to supply the plaintiff with a safe place in which to work, and failed to properly superintend and supervise the work going on at the time plaintiff was injured. That the defendants failed to promulgate proper and safe rules for the conduct of said work and to warn the plaintiff of the impending dangers. That the plaintiff, while using due care and caution on his part, sustained severe and permanent injuries to his left knee and left leg, when a floor of plywood dunnage, negligently laid in the hold of said barge, suddenly and without warning gave way and caused plaintiff's injuries herein complained of.

3. That by reason of said injuries, plaintiff has been confined in a hospital. That he has been required by said injuries to have an operation on his left knee. That he has suffered and will continue to suffer great pain, agony and mental anguish. That he has incurred expenses for medical and surgical attention and medicines. That the plaintiff has lost and will lose large sums of money which he otherwise would have earned as wages, and that the plaintiff has lost large sums of money for the expense of his maintenance and cure that plaintiff would otherwise have earned. That the plaintiff has

been permanently injured and will be unable to pursue his occupation because of the permanency of his injuries. That the plaintiff has been damaged in the sum of \$50,000.

Defendants' Contentions

Defendants' contentions are as follows:

1. Defendants deny that plaintiff was a seaman and also deny that plaintiff was a member of the crew of said vessel.

2. Defendants deny that said vessel was in navigable waters.

3. Defendants contend that if the plaintiff was injured and/or damaged as alleged, that the injuries and/or damages were solely and proximately caused by and contributed to by the negligence of the plaintiff, and that the plaintiff placed himself in a position of obvious danger.

4. Defendants contend that positions of safety were available to the plaintiff in the course of his work.

5. That because of defendants' allegation that plaintiff was not a seaman and crew member of the vessel *Alaska Queen*, the plaintiff should seek remedy, if any remedy he has, under the Workmen's Compensation Act of Alaska and under Section 43-330 of said Act, and that the plaintiff shall not be entitled to receive both damages and compensation. That the plaintiff has made the election to receive compensation under said Act, and therefore should be precluded from suing the defendants herein.

6. That the plaintiff, if injured at all, was injured while acting as a longshoreman employed on the navigable waters of the Territory of Alaska, and his injuries were exclusively subject to the Longshoremen's & Harbor Workers' Act, and that under the terms of said Act, the plaintiff cannot maintain a suit against his employers.

Issues of Fact

The following are the issues of fact to be determined by the Court herein:

1. Whether the plaintiff was employed as a seaman and/or crew member of the vessel *Alaska Queen*.

2. Whether the *Alaska Queen* was in navigable waters.

3. Whether the plaintiff was acting as a seaman or crew member of the *Alaska Queen* while carrying out his duties under the direction and supervision of the master and owner of said vessel.

4. Whether as a seaman or crew member of said vessel the plaintiff was acting as a seaman or crew member while engaged in stowing salmon on board a barge owned by the defendants and moored to the vessel *Alaska Queen*.

5. Whether or not the plaintiff sustained permanent injuries, if any, and the permanency of said injuries, if any, that the plaintiff sustained while engaged in his work and duties of stowing salmon.

6. Whether the defendants were negligent toward the plaintiff in not providing the plaintiff with a safe place in which to work.

Issues of Law

The following are the issues of law to be determined by the Court:

1. Whether the plaintiff was a seaman and/or crew member of the vessel *Alaska Queen*.
2. Whether the plaintiff is subject to the provisions of the Longshoremen's & Harbor Workers' Act.
3. Whether the plaintiff should seek his remedy under the Alaska Workmen's Compensation Act.
4. Whether the plaintiff as a seaman is entitled to recover against the defendants because of the negligent acts of the defendants.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by agreement of the parties on order of the Court.

Dated this 9th day of May, 1955.

/s/ WILLIAM J. LINDBERG,
U.S. District Judge

Approved:

/s/ Milton H. Soriano,
Of Attorneys for Plaintiff

/s/ H. J. Merrick,
Of Attorneys for Defendants

[Endorsed]: Filed May 9, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial before The Honorable William J. Lindberg, United States District Judge, on the 17th and 18th days of May, 1955, the plaintiff appearing in person and through his attorneys, Zabel & Poth; the defendants appearing through E. H. Bendiksen and Sweet, Wolf & Merrick, their attorneys; witnesses having been called and testified on behalf of both parties; documentary evidence having been adduced; the court having heard argument by both counsel; and having considered Briefs filed by both counsel; having fully examined the record herein and being fully advised in the premises, now makes the following

Findings of Fact

I.

That the plaintiff is a resident of Seattle, King County, State of Washington.

II.

That the defendant, Queen Fisheries, Inc., is a corporation, duly organized under and existing by virtue of the laws of the State of Washington, having an office and principal place of business within this jurisdiction, at Seattle, King County, Washington; that the defendant, E. H. Bendiksen, d/b/a E. H. Bendiksen Co., is a resident of King County,

Washington, with office in Seattle, King County, Washington.

III.

That at all times material hereinafter mentioned, the defendants were the owners and operators of that certain motor vessel known as the Alaska Queen, a vessel of some 297 tons.

IV.

That the plaintiff herein, Santos Cuadra, was employed by the defendants during the canning season of 1953 as a fish butcher aboard the floating cannery, Alaska Queen, said plaintiff being employed and hired through the Alaska Fish Cannery Workers Union in Seattle.

V.

That said plaintiff was transported to Bristol Bay, the defendants' canning operations, and returned from there to Seattle by air after the completion of the 1953 canning season.

VI.

That the Alaska Queen, prior to the start of fishing operations in the Bristol Bay area, is sailed north to the fishing area by its regular crew, consisting of a master, mate, two engineers, three deckhands and a cook, and that said crew again at the close of the season sailed said vessel back to Seattle from the site of canning operations in Bristol Bay.

VII.

That while said vessel is in the Bristol Bay area,

it is tied up to a dock as a floating cannery, and said vessel must be tied up at the shore in order to operate as a cannery, inasmuch as said industrial operation cannot be conducted without a steady supply of fresh water from the beach to be used in the boiler and in the cleaning and canning of the salmon. That in addition, said floating cannery must be tied up to the beach in order to have warehousing facilities on the beach for the cooling and storing of the canned salmon.

VIII.

That the plaintiff is a member of the Filipino cannery crew and is supervised separately from the regular crew of the vessel, who are under the supervision of the master of the vessel. That the cannery workers are paid pursuant to the cannery workers contract, and the regular crew of the vessel are paid based upon a percentage of the pack.

IX.

That on or about the 20th day of July, 1953, while said vessel, Alaska Queen, was tied up to the dock at a place in navigable waters, said plaintiff was engaged with other members of the Filipino cannery crew and the resident Indian cannery workers in stacking canned salmon aboard a barge moored alongside the Alaska Queen, said canned salmon being taken out of the warehouse on the beach via a conveyor belt onto the deck of the Alaska Queen, and then via conveyor belt into the barge moored alongside. That while the plaintiff was so engaged, he fell and injured his knee.

X.

That immediately following said injury, the plaintiff was afforded by the defendants herein hospitalization, medical treatment and compensation, under the terms and provisions of the Workmen's Compensation Act of Alaska, said Act being Section 43-3-1 of the Alaska Code of 1949.

From the Foregoing Findings of Fact, the court now makes the following

Conclusions of Law

I.

That the plaintiff herein is not a seaman or a member of the crew within the meaning of the Jones Act, but is an industrial worker and that his claim comes within the jurisdiction of the Alaska Workmen's Compensation Act, Section 43-3-1 of the Alaska Code of 1949.

II.

That plaintiff's complaint is dismissed with prejudice and without costs.

Dated this 17th day of October, 1955.

/s/ WILLIAM J. LINDBERG,
Judge

Presented by:

SWEET, WOLF & MERRICK,
/s/ H. J. MERRICK,
Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed October 17, 1955.

In The District Court of The United States, Western District of Washington, Northern Division

Civil Action—No. 3753

SANTOS CUADRA,

Plaintiff,

vs.

QUEEN FISHERIES, INC., a corporation, and
E. H. BENDIKSEN, d/b/a E. H. BENDIK-
SEN CO., Defendants.

JUDGMENT

This matter having come on regularly for trial before The Honorable William J. Lindberg, United States District Judge, on the 17th and 18th days of May, 1955; the plaintiff appearing in person and through his attorneys, Zabel & Poth; the defendants appearing through E. H. Bendiksen and Sweet, Wolf & Merrick, their attorneys; witnesses having been called and testified on behalf of both parties; documentary evidence having been adduced; the court having heard argument by both counsel, and having considered Briefs filed by both counsel; having duly examined the record herein and being fully advised in the premises; and this court having heretofore entered its Findings of Fact and Conclusions of Law; therefore,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein is dismissed with prejudice and without costs.

Dated this 17th day of October, 1955.

/s/ WILLIAM J. LINDBERG,
Judge

Presented by:

SWEET, WOLF & MERRICK,
/s/ H. J. MERRICK,
Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed and Entered Oct. 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Honorable Judge of the Above Entitled Court.

Notice Is Hereby Given that Santos Cuadra, the above named plaintiff, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of dismissal of plaintiff's cause of action with prejudice entered in this action on the 7th day of October, 1955.

Dated this 7th day of November, 1955.

ZABEL & POTH,
/s/ By OSCAR A. ZABEL,
Attorneys for Plaintiff

[Endorsed]: Filed November 7th, 1955.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

To: Honorable Judge of the Above Entitled Court.

Notice Is Hereby Given that Santos Cuadra, the above named plaintiff, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of dismissal of plaintiff's cause of action with prejudice entered in this action on the 17th day of October, 1955.

Dated this 8th day of November, 1955.

ZABEL & POTH,
/s/ By OSCAR A. ZABEL,
Attorneys for Plaintiff

[Endorsed]: Filed November 8, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Santos Cuadra, as principal and National Surety Corporation, a corporation, as surety, organized under the laws of the State of New York, and authorized to transact business as surety in the State of Washington, are held and firmly bound to the Queen Fisheries, Inc., a corporation, and E. H. Bendiksen, d/b/a E. H. Bendiksen Co., defendants in the above matter, in the full and just sum of \$250 to be paid to said Queen Fisheries, Inc., and E. H.

Bendiksen, d/b/a E. N. Bendiksen Co., their heirs, executors, administrators or assigns, to which payment truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Signed, Sealed and Executed this 7th day of November, 1955.

Whereas, lately in a District Court of the United States for the Western District of Washington, Northern Division, in a suit in said Court between Santos Cuadra as plaintiff and Queen Fisheries, Inc., and E. H. Bendiksen, d/b/a E. H. Bendiksen, as defendants, a judgment was rendered against said plaintiff on October 17, 1955, dismissing plaintiff's action and Complaint with prejudice. That said plaintiff has filed in said Court a Notice of Appeal to the U.S. Circuit Court of Appeals, Ninth Circuit, to reverse the judgment and decree made and entered herein in the aforesaid suit on October 17, 1955, dismissing plaintiff's action and Complaint and from each and every part of said order and decree.

Now the condition of the above obligation is such that if said order and decree shall be satisfied and complied with, together with costs, interest and damages for delay; and if for any reason the appeal is dismissed or if the order and decree are affirmed; and if there shall be satisfied and complied with in full such modification of said judgment and decree and such costs, interest and damages as the Appellate Court may adjudge and award, and if the ap-

pellant and plaintiff shall fail to make his plea good, then the above obligation shall be void; otherwise it shall remain in full force and virtue.

SANTOS CUADRA,
By ZABEL & POTH,
/s/ By OSCAR A. ZABEL,
Attorneys for Plaintiff

[Seal] NATIONAL SURETY CO.,
/s/ By MILDRED PALITZKE,
Its attorneys in fact

[Endorsed]: Filed November 7, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the plaintiff-appellant herein and pursuant to the rules sets forth the points on which he intends to rely as follows, to-wit:

1. That the Court committed reversible error in its entry of Findings of Fact, Conclusions of Law, and Judgment of Dismissal with prejudice of plaintiff's complaint;

2. The Court committed reversible error in not entering the judgment in favor of plaintiff-appellant against the defendant-respondents as prayed for by plaintiff's complaint;

3. That the trial Court committed reversible error in entering a Conclusion of Law that the plaintiff herein is not a seaman or a member of the crew

within the meaning of the Jones Act, but is an industrial worker and comes within the jurisdiction of the Alaska Workmen's Compensation Act.

Dated this 22nd day of November, 1955.

ZABEL & POTH,

/s/ By OSCAR A. ZABEL,

Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 23, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the plaintiff and designates the following as his record on appeal:

1. Complaint;
2. Answer;
3. Pre-Trial Order;
4. Findings of Fact and Conclusions of Law;
5. Judgment;
6. Notice of Appeal;
7. Amended Notice of Appeal;
8. Cost Bond on Appeal;
9. Designation of Record on Appeal;
10. Statement of Points Relied Upon on Appeal;
11. Reporter's Transcript of the Evidence and

Proceedings, excluding Opening Statements and Closing Statements.

ZABEL & POTH,
/s/ By OSCAR A. ZABEL,
Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed November 23, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith, the following original papers in the file dealing with the action, as the record on appeal herein from the judgment filed Oct. 17, 1955, to the United States Court of Appeals at San Francisco, to-wit:

1. Complaint, filed July 22, 1954.
5. Answer, filed Aug. 30, 1954.
8. Pretrial Order, filed May 9, 1955.
16. Findings of Fact and Conclusions of Law, filed 10-17-55.

17. Judgment filed October 17, 1955.
18. Notice of Appeal, filed Nov. 7, 1955.
19. Cost Bond on Appeal, filed Nov. 7, 1955.
20. Amended Notice of Appeal filed Nov. 8, 1955.
23. Designation of Record on Appeal, filed Nov. 23, 1955.
22. Statement of Points Relied on Upon Appeal, filed 11-23-55.
21. Court Reporter's Transcript of Testimony and Proceedings, filed 11-23-55.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit:

Notice of Appeal, \$5.00; and that said amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 29th day of November, 1955.

[Seal]

MILLARD P. THOMAS,
Clerk

/s/ By TRUMAN EGGER,
Chief Deputy

In The District Court of the United States, Western District of Washington, Northern Division

Civil Action—No. 3753

SANTOS CUADRA, Plaintiff,

vs.

QUEEN FISHERIES, INC., a corporation; and
E. H. BENDIKSEN, dba E. H. BENDIKSEN
CO., Defendants.

TRANSCRIPT OF PROCEEDINGS

Tuesday, May 17, 1955, Wednesday, May 18, 1955

Be It Remembered that the aforementioned case came on for trial in the District Court of the United States for the Western District of Washington, Northern Division, on Tuesday, May 17, 1955, May 18, 1955, and concluded after argument on Friday, May 20, 1955.

Appearances:

Philip J. Poth and Milton H. Soriano (Poth & Zabel), 518 Fourth & Pike Building, Seattle 1, Washington, appearing for and on behalf of the Plaintiff, Santos Cuadra. H. J. Merrick, Esq. (Sweet, Wolf & Merrick), 1015 Joseph Vance Building, Third & Union Street, Seattle 1, Washington, appearing for and on behalf of Defendant, Queen Fisheries, Inc., a corporation; and E. H. Bendiksen, dba E. H. Bendiksen Company.

Mr. Poth: Does the Court desire an opening statement?

The Court: Well, I don't know that it is necessary. We have a pre-trial order in here.

Mr. Soriano: I would like to call Mr. Luciano Vequilla.

LUCIANO VEQUILLA

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Soriano:

Q. Will you state your name please?

A. Luciano Vequilla.

Q. Where do you live, Mr. Vequilla?

A. I live in Delano, California.

Q. What is your occupation, Mr. Vequilla?

A. Laborer.

Q. In the year of 1953 did you have the occasion to be employed by Queen Fisheries, Inc.?

A. Yes, sir.

Q. Where were you working when employed by Queen Fisheries?

A. In the Bristol Bay Area.

Q. In Bristol Bay? A. Yes. [1*]

Q. While in Bristol Bay where were you stationed? Where were you working with regard to your employment?

A. We were working in the boat.

Q. On the "Alaska Queen"? A. Yes.

Q. While working on the Alaska Queen what

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Luciano Vequilla.)

was the nature of your duties, and what type of work did you perform? What kind of work did you do? A. Oh, general work.

Q. And where were your quarters while working on the Alaska Queen, Mr. Vequilla?

A. Quarters? What do you mean?

Q. Where did you sleep? A. In the boat.

Q. On the vessel? A. In the vessel.

Q. I see. Who slept there with you? Could you tell me who else?

A. The members of the gang.

Q. The members of the crew?

A. The crew.

Q. Where did you eat? A. In the boat.

Q. Who prepared your food for you?

A. Yes, we sleep in the boat and we eat in the boat.

Q. Was the food prepared on board the vessel? Was the [2] food cooked on the ship?

A. They got a cook.

The Court: (Witness admonished to speak louder.)

They ate on the boat.

Mr. Soriano: Yes, he ate and he slept on the boat.

Q. Mr. Vequilla, will you state to the court what other types of duties, what other work you performed while on the vessel?

A. Well, we worked all around.

Q. You worked all around. Did you have occasion to work on board a scow or a barge?

(Testimony of Luciano Vequilla.)

A. Yes, we worked in the barge.

Q. What were you doing on the scow?

A. We were loading the salmon cases.

Q. You were loading the salmon cases. And where was the scow?

A. The scow was tied up on the side of the Alaska Queen.

Q. On the side of the Alaska Queen. How did the scow get alongside the Alaska Queen?

A. Oh, they tied up on the side of the Alaska Queen.

Q. You were loading salmon cases?

A. Loading cases, yes.

Q. Where were these salmon cases coming from?

A. From the warehouse.

Q. From the warehouse? A. Yes. [3]

Q. And from the warehouse they passed over to the Alaska Queen?

A. Alaska Queen, through the rollers.

Q. On rollers?

A. On rollers there to the scow.

Q. Can you describe to me what was the barge like that you were working on? What were the circumstances under which you were working?

A. The barge, before we started loading, we put boards.

Q. Platforms or boards?

A. Platforms over the whole barge.

Q. Over the whole barge?

A. Over the whole barge, you know, we put platforms, so as soon as we finished——

(Testimony of Luciano Vequilla.)

Q. (Interposing) What was the nature, what types of boards were they?

A. Well, they were divided into pieces, you know, not the same size of board.

Q. Divided into pieces, not the same size boards. Were they all the same?

A. Not the same——

Q. (Interposing) ——types of material?

A. The same boards but not the same size of the boards, you know what I mean?

Q. Yes. [4]

A. That board—they put something underneath the ends.

Q. (Interposing) A block?

A. A block. So they put, we put all around in the barge.

Q. Now during the course of your duties on board the Alaska Queen who ordered you to take care of this work, who ordered you to do this work?

A. Mr. Benediction ordered us to put the boards inside of the scow.

Q. Who is Mr. Benediction? What was his capacity?

A. He is the boss over there in the Alaska Queen. He is the boss of the Alaska Queen.

Q. When you placed these boards on the barge was he there to supervise the work?

A. Yes, he was there. He is the one who instructed us to put all of the boards in before we started loading the cases of salmon.

(Testimony of Luciano Vequilla.)

Q. Now, you know Mr. Cuadra, of course. Was Mr. Cuadra on the barge there with you at the time this work was taking place?

A. Yes. He was there.

Q. Were you on the barge when Mr. Cuadra was injured? A. Yes, sir.

Q. Did you see the accident? A. Yes.

Q. Could you describe what occurred? [5]

A. Yes. The first time when the salmon shoot to the roller, go through to the barge, we take one by one. I was following him. He take one and he turn around, and then I take one and then I follow him because we are going to put in a pile that case of salmon. Then he missed the step of that board because that board was not secure.

Q. The board wasn't secured.

A. He missed his step on that board, you know. He stepped on the edge of that board, so the board fly up and hit his knee. He fell down.

Q. Was he able to get up?

A. He said he could hardly get up, and then somebody helped him to get up.

Q. Did you have an opportunity to observe his leg? Did you look at his leg?

A. Yes, I looked at his legs. They swelled up right away, you know.

Q. What happened to Mr. Cuadra after that?

A. Somebody took him upstairs in the ship.

Q. Was he able to work?

A. No, he could not work until we finished the season.

(Testimony of Luciano Vequilla.)

Q. I see.

Now, on this barge where did the platforms or dunnage, where did it come from? [6]

A. From the warehouse.

Q. From the warehouse? Who brought it there?

A. The natives just they work in the warehouse.

Q. The natives? A. The natives.

Q. And they were doing the work, and performing the work in the warehouse; they carried the boards to the Alaska Queen?

A. To on top of the Alaska Queen and somebody handed them down to the barge.

Q. Did you notice who was handling the barge lines as you were stowing the salmon?

A. We handled the barge lines.

Q. Well, you were the men that handled the barge lines? A. Yes.

Q. And you moved the barge back and forth according to where you wanted it stationed to load the salmon? A. Yes.

Q. Now when you first got on board the barge was the dunnage there? Were the platforms there?

A. No. The platforms were not in there yet.

Q. Who decided that the dunnage or platforms would be put on board the barge?

A. Mr. Benediction.

Q. Who did he instruct to put the—— [7]

A. To put the boards, all the boards around the barge.

Q. Who did he tell to do that?

A. Mr. Benediction.

(Testimony of Luciano Vequilla.)

Q. No, who? Mr. Benediction told whom to do what? The men that were working on the barge?

A. Yes, he instructed all of the boys to put in the——

Q. (Interposing) He directed you to put the——

Mr. Merrick: Let's let him testify, counsel. I know it is hard, but I don't think we should lead him so much.

Q. (By Mr. Soriano): As you were stowing the salmon, how did you stow it? Will you explain where you stowed the salmon?

A. Do you mean "piled" the salmon?

Q. Yes. A. In the barge.

Q. Pardon. Oh, in the barge?

A. We piled it in the barge.

Q. Where about in the barge?

A. Well, since we have the salmon——

Q. What I am trying to do is to take step by step the manner in which you stowed the salmon. Could you explain or describe where you stowed the salmon first?

A. When we take the salmon we walked to the place that we could start the piling and piled the salmon. [8]

Q. Tiers? A. Tier by tier.

Q. You didn't floor off the salmon?

A. No. We didn't put salmon by, you know, flat, but we just piled step by step, you know.

Q. Tier by tier? A. Tier by tier.

Q. What was on the floor of the barge? Were

(Testimony of Luciano Vequilla.)

there any salmon cases there at all that you could walk on?

A. No, there is no salmon, only the platform.

Q. Just the platform? A. Yes.

Q. What were the platforms used for? What was the purpose of the platforms?

A. They said it is to protect for the water so the cases of salmon wouldn't get wet.

Q. Was there anything else besides the platforms used? A. Well, that is all.

Q. Did you cover the salmon with anything?

A. Oh, as soon as we finished we just covered it up with a big canvas.

Q. When you were ordered to dunnage or platform the barge who instructed you as to how to perform that work or how to do it?

A. Mr. Benediction.

Q. Did he order you to floor off the entire [9] barge?

A. We put the entire barge in platforms, the whole, you know what I mean. We put the platforms before we started the loading.

Q. What is the usual way that a person would—have you had occasion to see other barges loaded with salmon? Have you worked at other canneries?

A. No, I never worked in the barge in the other canneries.

Q. You never worked in them?

A. Because there is somebody working, you know, there.

Q. You are not an experienced salmon stower?

(Testimony of Luciano Vequilla.)

A. Yes.

Q. You haven't stowed any salmon prior to this time then for other canneries?

A. Oh, no, no; not at any other cannery, no.

Q. On barges? A. No.

Mr. Soriano: I believe that is all of the questions that I have.

Cross Examination

By Mr. Merrick:

Q. How long have you worked in salmon canneries? A. Oh, it is about since 1929.

Q. When did you come to this country from the Philippines? A. I came here in 1928.

Q. And you have worked in the canneries ever since 1928? [10]

A. Yes, I have worked in the canneries.

Q. Well, the Filipinos always stack the canned salmon in the warehouse, don't they?

A. Yes, in the warehouse.

Q. Well, that is the same type of work that you were doing in this barge, wasn't it? There is no difference?

A. Oh, no; it is different in the warehouse than in the barge.

Q. Well, you just stack the salmon up, don't you?

A. Well, of course, we stack in the cannery, I mean in the warehouse and in the barge different.

Q. By the way, is your full name "Luciano"——

A. Luciano Vequilla.

(Testimony of Luciano Vequilla.)

Q. Do you have a middle initial?

A. "S." Vequilla.

Q. Yes. Now, when did you first go to work for Mr. Bendickson?

A. In 1951.

Q. In 1951. And did you work there in 1952?

A. Yes.

Q. How about 1953? All of 1953?

A. Yes.

Q. Did you work there in 1954?

A. No.

Q. Was there any particular reason why you didn't work there in 1954? [11]

A. Well, he wrote a letter to me; it was in November, that he don't operate in 1954, so——

Q. (Interposing) He wouldn't hire you——

A. (Continuing) ——we don't work in his place.

Q. Now——

A. Well——

Q. Are you through?

A. And then I heard that he is going to operate.

Q. Well, he did operate last year, didn't he?

A. Yes.

Q. Now, how were you first hired to go to work for Mr. Bendickson?

A. Why, through his foreman boss because he got a foreman boss.

Q. Well, didn't you hire out through the cannery workers union?

A. Oh, yes.

Q. You have been a member of the cannery workers union for some years?

A. Yes, sir.

Q. And what union is that?

A. American Federation of Labor.

Q. And that is how you got your job with Mr.

(Testimony of Luciano Vequilla.)

Bendickson's cannery, is it not? A. Yes. [12]

Q. Now do you work under the Alaska Salmon Industry cannery contract?

A. Oh, before. There is no union before.

Q. I mean in 1953. A. Oh, in 1953?

Q. You worked under the union contract, did you not? A. Yes.

Q. And how were you paid?

A. Paid by guarantee.

Q. You got the season guarantee? A. Yes.

Q. And that is the guarantee that all of the cannery workers get, is it not? A. Yes, sir.

Q. You are guaranteed two months' pay?

A. Yes, sir.

Q. Now you were a retort man in the cannery, weren't you? A. Yes, sir.

Q. How long have you been a retort man? Have you worked at that job in other canneries?

A. Oh, I worked in the different canneries, I was working driving a jitney.

Q. Yes. A. And I worked retort too.

Q. Yes. A. In the different canneries.

Q. Now when you went to work for Mr. Bendickson in 1953 how did you get up to Alaska to work? A. By airplane.

Q. You didn't go up on the vessel?

A. No.

Q. You were flown up? A. Yes.

Q. Now when you got there the vessel was tied up, was it not? A. Yes.

Q. And it was tied up to the beach?

(Testimony of Luciano Vequilla.)

A. No, in the river.

Q. It was tied up in the river. Well, it was tied up to a pier, was it not?

A. Well, in the bank of the river anyway.

Q. Well, did this floating cannery move at any time while you were there?

A. It never moved.

Q. Not once?

A. It was just tied up in the bank of the river.

Q. And after the season was over and you had gotten your two months' guarantee how did you get back to Seattle?

A. By plane.

Q. You fly back. You didn't come back——

A. (Interposing) In the boat, no.

Q. (Continuing) ——on the floating cannery?

Q. They had a regular crew to take the vessel up and back, did they not?

A. Yes.

Q. Now you say you ate on the ship?

A. We ate on the ship.

Q. There wasn't any place for you to eat on the shore, was there?

A. Pardon me?

Q. There was no place to eat on the shore, was there?

A. No, no.

Q. Now the cannery crew is supervised by a Filipino cannery foreman, isn't it?

A. Yes, but——

Q. Well, it is run the same as any other cannery, isn't it?

A. Yes.

Q. Only it just has one line, just one cannery line?

A. Yes.

Q. Now when you work in this cannery line

(Testimony of Luciano Vequilla.)

there are also natives working there with you in the cannery line, are there not? The Indians also work in the cannery with you?

A. Well, some.

Q. Yes.

A. Someplace; not in the fish house. Mostly all in the fish house are Filipinos working in there.

Q. Well, the natives also work in this barge with you [15] stacking salmon, don't they?

A. Oh, some, because they need lots of boys to work in that barge. We cannot occupy all of the place anyway, so they put some of the natives to help us to pile it.

Q. In other words, you were all mixed together——

A. (Interposing) ——worked together.

Q. (Continuing)——working this barge stacking salmon? A. Yes, mixed together.

Q. And you also all work together on the cannery deck canning salmon? A. Yes.

Q. And also sometimes the Filipinos work in the warehouse on the beach with the Indians, don't they? A. Oh, yes.

Q. Now, how long have you known Mr. Cuadra?

A. I knew him for a long time; maybe 10 years I know him.

Q. The Filipino boys all slept together in one room, is that right? A. Yes, sir.

Q. You do not have any seaman's papers yourself, do you? A. No.

(Testimony of Luciano Vequilla.)

Q. You have always worked as a cannery worker yourself, is that right?

A. Oh, we work all around in the Queen Fisheries.

Q. Well, in other words, you did whatever they wanted you [16] to do working in the cannery operation, is that right?

A. Yes, sir.

Q. It is the same as any other cannery that you have ever worked in, isn't it, except that it is located on a vessel?

A. Yes.

Q. It is no different than any of these others that you have worked for, is it?

A. Well, in other words, in floating on the——

Q. Well, it is floating, but it is the same type of operation as the other canneries, is it not?

A. On, of course.

Q. In other words, as a retort man, you would do the same thing as if you were working for Libby's at Tawauk or at any of those places?

A. Oh, yes.

Q. Did you ever work for Libby's?

A. No, for Skinner & Eddy.

Q. You worked for Skinner & Eddy.

Q. Now on the day in question when Mr. Cuadra hurt his leg, what time did you go to work in the barge that day? What time did you start out?

A. We started about 8 o'clock.

Q. About 8 o'clock in the morning? And what time did he fall down and hurt his leg? [17]

A. What time?

A. Yes.

(Testimony of Luciano Vequilla.)

A. I don't remember what time it was.

Q. Would it be late in the afternoon?

A. No, not that. When he started to work, you know, when we started to piling the cases is when he met his accident at that time.

Q. Well, he had worked several hours before he fell down and hurt his leg, hadn't he?

A. Oh, about two hours, I guess.

Q. You say it happened in the morning then?

A. Yes, it was.

Q. What time in the morning?

A. We started about 8 o'clock; maybe around 9 o'clock, I guess, 9 or 10 o'clock, something like that; I couldn't say exactly.

Mr. Soriano: I don't believe he understands your question.

Mr. Merrick: I am trying to find out what time of day he hurt his leg.

Q. You started working you say about 8 o'clock in the morning?

A. Eight o'clock. Maybe about 10 o'clock. I don't remember what time is that, maybe around 10 o'clock.

Q. Could it have been 3 or 4 o'clock in the afternoon? A. Pardon me? [18]

Q. Could it have been 4 o'clock in the afternoon?

A. No.

Q. Did you work steadily all day in the barge?

A. Yes, we worked until we finished.

Q. Well, how many hours would you work, eight or ten? A. Oh, maybe 10 hours, I guess.

(Testimony of Luciano Vequilla.)

Mr. Merrick: That is all I have.

Mr. Soriano: I have just a couple of questions.
Just a moment.

Redirect Examination

By Mr. Soriano:

Q. How long had you worked on this particular barge that you were loading at the time that Mr. Cuadra was injured?

A. I worked about 10 hours.

Q. On the same barge?

A. On the same barge.

Q. Now, this barge——

The Court: I didn't understand that. You say you worked 10 hours yourself, is that right?

Witness: Yes. Because Mr. Cuadra was accidentally injured, and also there were still boys working to finish. Ten hours, we worked about ten hours at that time.

Q. Now this barge, how was it brought alongside of the Alaska Queen? [19]

A. Yes. Pardon me?

Q. How was it brought alongside the Alaska Queen? A. The gas boat.

Q. The gas boat? A. Yes.

Q. A cannery tender?

A. A cannery tender, yes. The cannery tender brought it to the side of the Alaska Queen.

Q. Where were they taking the salmon?

A. When we finished loading that barge they

(Testimony of Luciano Vequilla.)

take it out of the river to the bay because the big ship is waiting for it.

Q. The ship? A. Yes.

Q. Do you know how many barges were taken in and out of there?

A. Just only one. Only one barge we bring out.

Q. Is that the only barge you loaded for the entire season?

A. Oh, well, that is the only time that I worked.

Q. That is the only one you worked on?

A. Yes.

Q. Actually the barge was afloat when it came back and forth. What was the condition around the Alaska Queen? Was she high and dry, or was she anchored, or just what was the condition of the water around the Alaska Queen? [20]

A. The water at high tide the water would be up, you know what I mean. At high tide the water go inside of the river, but still that river never dry, you know.

Q. There was ample water to bring the Alaska Queen in and also to bring barges back and forth?

A. Yes.

Q. Were the barges brought in by cannery tenders belonging to the Alaska Queen, or to the Queen Fisheries? A. Yes.

Mr. Soriano: That is all the questions I have. Thank you.

Mr. Merrick: I have no recross examination.

I would like to have this man stay in attendance, your Honor.

(Testimony of Luciano Vequilla.)

The Court: Is he under subpoena?

Mr. Poth: We will keep him, your Honor.

(Witness excused.)

Mr. Poth: I will call Mr. John E. Stewart.

JOHN E. STEWART

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. John E. Stewart. [21]

Q. Where do you live, sir?

A. My address is 6608 S.E. 24th, Mercer Island, Wash.

Q. And are you a licensed and practicing physician and surgeon under the laws of the State of Washington? A. Yes, I am.

Q. Do you maintain offices or a clinic in this vicinity, Doctor?

A. I maintain offices at 1012 Summit Avenue in Seattle.

Q. And during your practice, did you have occasion to see and treat Santos Cuadra, the plaintiff, in this action? A. Yes, I did.

Q. And who, if anyone, employed you, Doctor?

A. He was sent to me for treatment by the Pacific Insurance Adjusters.

Q. And what did you find? Well, when did you first see him, Doctor?

(Testimony of John E. Stewart.)

A. I first saw Mr. Cuadra on July 29, 1953.

Q. And what was his condition at that time?

A. Well, Mr. Cuadra came to me with a complaint of pain in the left knee which he had ascribed to an accident which occurred on July 20, 1953. Would you like his history as he gave it to me?

Q. Well, no.

A. Just what his condition was?

Q. Yes.

A. Examination of the left knee showed a slight increase [22] in circumference just above the patella, this being $14\frac{3}{4}$ on the left and $14\frac{1}{2}$ on the right. This along with the feel of the knee suggested the presence of a slight amount of fluid in the knee joint. The tenderness was localized over the femoral or upper attachment of the ligament which joins the knee joint together on this inner side, that is, the ligament which goes from the femoral condyle to the tibial condyle, and the tenderness in that locality indicated to me at that time that I was probably dealing with a strain of his medial ligament.

He had some limitation of flexion on this left side, the heel coming to within 10 inches of his buttock while on the right side it would touch his buttock. Those are my findings on his knee at that examination.

Q. And did you make any later diagnosis?

A. My diagnosis at that time was a strain of the medial collateral ligament of the left knee.

(Testimony of John E. Stewart.)

Q. Was his knee swollen or anything that you could see from the outside?

A. There was a very slight amount of swelling, as indicated by my measurements, the left knee being a quarter of an inch only greater than the right.

Q. What if anything did you do to treat him, if you did treat him at that time? [23]

A. The initial treatment consisted of felt and elastic bandage support to the knee and physical therapy in the form of heat and massage and whirlpool baths in a hydro tub.

Q. When did you next see him?

A. I saw him on August 5, 1953.

Q. Was that at your office?

A. That was at my office.

Q. What was your diagnosis at that time, if you remember?

A. My diagnosis was still a strain of the medial ligament of the left knee.

Q. Did you ever make any different diagnosis?

A. Yes, I did.

Q. What was that, Doctor?

A. It was following several months of conservative therapy during which time I had given him this belt and Ace Bandage support and given him a plaster cylinder to completely immobilize the knee which I applied on September 22 and removed on October 21st.

Q. A plaster cylinder?

A. So that was about a month, yes.

Q. What is it?

(Testimony of John E. Stewart.)

A. It is a cast to keep the knee from moving, and feeling that with this type of injury the healing would take place better with immobilization. And because of [24] continued complaint of pain I finally decided to explore the knee joint surgically.

Q. And did you make such an exploration, Doctor?

A. I made such an exploration on November 10 at the Providence Hospital.

Q. What did you find, if anything, upon your exploration?

A. At the time of exploration I found some hypertrophy or overgrowth of the pad of fatty tissue just underneath the patellar tendon. I found some fraying and yellowness of the medial meniscus, but no frank tear, such as one usually finds in any severe injury to the meniscus. The meniscus was removed in its entirety because one is unable to explore the back half of the meniscus without taking it out, and no tear was found in the back half of the meniscus. It too was yellowish in color and somewhat frayed.

Q. How did he progress after that?

A. Very slowly. He was discharged from the Providence Hospital on November 23. On November 30 there was still a small amount of fluid in his joint. On December 14 I have a note that Mr. Cuadra states that he is much better now than he was prior to his surgery, but I noted he still lacked five degrees of complete extension.

On January 12, now eight weeks post-operative,

(Testimony of John E. Stewart.)

at the present time he is walking with some limp. He [25] continued with his physical therapy treatments. On February 1, 1954, he still continued to have some pain in his knee. On February 8 because of continued complaint of pain in the knee I gave him an injection of some hydra-cortone which is an anti-inflammatory medication that we use to quiet down a reaction within the joint.

On February 15 I made a note that this patient is difficult to evaluate in that there was very little, if any, objective evidence of disability. The swelling had gone down. The measurements above the patella were the same. There was no fluid in the joint.

I have a note that he stated that he could not get along without his bandage, but I indicated I felt he was now using it as a crutch and we start going without the bandage.

A note on March 1: he stated that he was getting better, that he had no physical therapy for the past week, no swelling of the knee; on March 5, he was still complaining of pain in his knee and wanted more physical therapy but I urged him to continue on with his over-all general activity.

On March 22, he was walking without a limp and he had a full range of knee movement and but one-half inch atrophy of the left thigh. At that time I stated [26] it was my opinion that he was ready for some type of work.

On April 12, a full range of movement of his knee, no swelling. He was still complaining some-

(Testimony of John E. Stewart.)

what of pain and I noted I found it difficult to understand his complaints in view of the lack of objective evidence. I did give him a second hydra-cortone infiltration, and on April 19 he stated that he had felt better following the hydra-cortone infiltration and I urged him to find a job and to check with me in one month.

There were two more visits, one on 5-17-54, at which time he stated he got along all right during the daytime but had occasional aches at night. He had a full range of movement, and he now pointed to the outer side of the knee as to the area of discomfort.

The surgery had been on the innerside of his knee. He had no pain in the area that the surgery had been carried out. I neglected to mention that at the time of the surgery I was able to visualize the anterior or front half of the lateral side of the knee joint by retracting the patellar tendon to one side, and I could see no evidence of anything wrong with the lateral meniscus, and this was the area of which he was complaining of pain on my last visit of 5-17-54. [27]

He was advised that no further treatment was indicated and that I felt that he was capable of full duty and no further visits were planned.

He did come to me on August 12 with a form for unemployment compensation, and on examination then he had a full range of movement of the knee. His complaint was still on the lateral aspect, not over the operative area, no swelling present, no

(Testimony of John E. Stewart.)

fluid in the joint, and at the time the form was filled out I noted that I had felt that he had been ready for full-time work on 5-17-54, and part-time work as of 3-22-54.

I noted "I do not think this patient is having the pain of which he complains." At the time of surgery the anterior portion of the lateral meniscus could be viewed and nothing abnormal was found in that area.

Q. Did you take X-rays of him?

A. Yes, I did.

Q. And when did you take the last X-rays, Doctor?

A. The last—the X-rays—the only X-rays—there were two sets of X-rays, one on 7-29-53 and one on 9-8-53.

Q. There have been no X-rays taken since 9-8-53?

A. Not by me, no, sir. No. Those X-rays were within normal limits. [28]

Q. That would be September 9, 1953?

A. That is correct.

Q. What date did you operate on him?

A. I beg your pardon?

Q. What date was it that you operated on him?

A. I operated on him the month after that, 11-9-53.

Q. Does this man in your opinion have any permanent disability?

A. At the time of my last examination I recommended a disability of 15 per cent on that knee

(Testimony of John E. Stewart.)

based primarily on his subjective complaint and the fact that he was missing his medial meniscus which I believe gives some disability ordinarily.

Q. And that would be attributable to the injury that he sustained, I believe, July 20, 1953?

A. I didn't get that.

Q. That would be attributable to the injury he sustained July 20, 1953? A. Yes.

Q. While working in Alaska? A. Yes.

Mr. Poth: I have no further questions, Doctor. Thank you.

Cross Examination

By Mr. Merrick: [29]

Q. For the record, I think you should be qualified, Doctor. Where did you take your medical training?

A. I am a graduate of Harvard medical school and following a year of internship in the Alameda County Hospital and three years of Marine duty with the Navy, I had four years of orthopedic training at Harvard, that is, in Boston at the Massachusetts General Hospital, Peterbent Brigham, Boston Children's Hospital.

Q. Do you belong to any, are you a member of any boards?

A. Yes, I am a member of the American Board of Orthopedic Surgeons.

Q. And of any societies?

A. And of the King County Medical Society, American Medical Society, the American Board of Orthopedic Surgeons, the West Coast Orthopedic

(Testimony of John E. Stewart.)

Association, the Pacific Northwest Orthopedic Society.

Q. You specialize then in the orthopedic branch of medicine?

A. I do only orthopedic work.

Q. Now I believe you testified that you rated this man at 15 per cent permanent partial disability. Was that your testimony? A. Yes.

Q. Is that a minimum rating under the Alaska Compensation Act?

A. That is a rating which expresses a minimal disability to a knee joint. [30]

Q. And that was because, you say, of subjective symptoms and the fact that you had found it necessary to remove the cartilage?

A. That is correct.

Q. At the time of your rating there were no objective symptoms?

A. No. He had a full range of movement, no tenderness over the operative side, and no swelling of the knee joint.

Q. I gathered that you had a good result from the surgery, is that right?

A. I am sorry; I didn't get that exactly.

Q. The result from surgery was satisfactory, was it not?

A. He had no further complaints on that side of the knee where the surgery had been carried out.

Q. When he first came to you that was the only side of his knee that he was complaining about, is that right? A. That is true.

(Testimony of John E. Stewart.)

Q. And after surgery he complained about the outer side of the knee, is that right?

A. I believe it was about a month or two after the surgery that he first complained of pain on the outer side of his knee.

Q. I believe that you testified that during the surgery you had an opportunity to examine the outer side of the [31] knee and you could find nothing wrong?

A. I could see nothing wrong with it.

Q. Now initially my understanding is that you treated him conservatively, is that the word you used?

A. I treated him conservatively for quite a few months because I did not feel that during those first few months' period that he had anything that would require surgical exploration, such as a torn meniscus.

Q. In other words a knee injury can be treated conservatively or by using surgical intervention, is that right?

A. Yes, depending upon the indications that are present.

Q. For the record, what is conservative treatment?

A. Conservative treatment consists of carrying out support measures usually in the form of rest, massage, hydracortone infiltrations of the joint, all of these designed to allow nature to heal an injured area without intervention by the physician.

Q. Initially you started out by using a felt and

(Testimony of John E. Stewart.)

elastic band on his knee? A. That is correct.

Q. Was that one of those Ace bandages that you put on?

A. That is an Ace bandage that is wrapped around the knee and it immobilizes it about 50 per cent of the way.

Q. Now, you treated him conservatively then until approximately November 10 when you operated on the knee? [32]

A. That was my operative date.

Q. And I believe you testified that the meniscus which was removed was yellowed, or a yellow color?

A. Yes, it was.

Q. Is there anything significant about that?

A. It indicates degenerative changes within the meniscus. I was frankly disappointed in not finding a tear in this meniscus. It is usually in those menisci which are completely torn at the time of injury that we get our most satisfying results because we obviously remove something that has been badly damaged, but this meniscus was yellowed, which as I say, is a finding of degeneration. The margins were frayed, and there was no evidence of acute injury.

Q. Well, from the yellowness could it be that it would be an old injury?

A. Old injury, or aging, premature aging in an individual.

Q. And then you can't testify with reasonable medical certainty that this injury resulted from an accident of July 20, can you?

(Testimony of John E. Stewart.)

A. If I may qualify that, the injury to the meniscus, no, I can't testify that the changes in the meniscus were due to the injury of November 20.

Q. Or do you mean of July 20.

A. Or July 20. I did feel that the man had injured *his* [33] from my first examination.

Q. But this fraying and yellowing meniscus would indicate an old injury, degenerative. or——

A. Yes, it would. That is, one of many years' duration.

Q. Now after your surgery did you again at any time find any objective evidence of injury?

A. Well, during the immediate, post-operative period there was the usual fluid within the joint and tenderness that one finds anywhere from six to eight weeks' post-operative, and which subsided in perhaps a little longer than the usual amount of time, that is, in eight weeks rather than in four or six weeks, but other than that there were no objective signs. I believe I did mention that the thigh measurements on the left side at the time that I discharged him was one-half inch less than on the right.

Q. Could that be unusual in the normal person?

A. No, neither for a normal person than a right-handed individual usually has a larger right thigh than left and surgery alone and the period of immobilization that he had would be adequate to explain that amount of atrophy.

Q. In other words, there is nothing significant

(Testimony of John E. Stewart.)

about the one inch atrophy as far as the operation is concerned?

A. Of a half-inch atrophy, or—— [34]

Q. Yes, a half inch?

A. Half inch? No, that is not a significant amount of atrophy.

Q. Now when was the last date that you noticed any evidence of fluid in the joint?

A. February 15 I noted that there was no fluid in the joint.

Q. What is significant about that, if anything?

A. Fluid in the knee joint is a response to internal irritation, and ordinarily if there is any irritation within the knee joint, such as from a torn meniscus there will be a response in the form of generation of fluid. Therefore, if no fluid is present one can be reasonably certain that there is very little irritation within the joint.

Q. I see. Getting back to these X-rays. X-rays of the knee joint, those would only show bone damage anyway, wouldn't they?

A. They would show bone damage; if there were considerable degeneration of the articular surface of the knee joint, it would show narrowing of the joint space which was not present here and was not apparent at the time of surgery.

Q. I believe you testified that the pictures of the—in other words, they were within normal limits? [35]

A. They were within normal limits.

Q. I believe you testified that as of March 22

(Testimony of John E. Stewart.)

he was ready to go back for some type of work?

A. Yes.

Q. And you urged him to go to work, was that it?

A. Yes I did.

Q. Did he appear reluctant to look for work?

A. Yes.

Q. I believe you testified that as of May 17, 1954 in your opinion he was ready for full duty?

A. Yes.

Q. The date was 5-17-54, I believe you said?

A. Yes.

Mr. Merrick: That is all that we have.

Redirect Examination

By Mr. Poth:

Q. Do you have your office record with you there, Doctor?

A. Yes, indeed.

Q. I wonder if I could just review it for just a minute and it might prompt me to ask some further questions.

A. Surely.

Q. I noticed that you made a notation in here on your operative procedure, "through a transverse incision over the interior, medial joint line a torn cavity was exposed." What torn cavity were you referring to, Doctor? [36]

A. The knee joint cavity. We call the area within the knee joint the joint cavity since it is enclosed by a capsular membrane.

Q. Was that torn?

A. No.

Q. No?

A. No.

Q. I notice there was erosion on the anterior

(Testimony of John E. Stewart.)

margin of the articular surface of the femur, where this had been impinging? A. Impinging.

Q. (Continuing) Upon this torn medial meniscus. What torn medial meniscus were you referring to, Doctor?

A. I think if you will read the description under the findings there that I mentioned that the anterior horn of this meniscus was frayed and with a small fragment. That is not, and I purposely left out the word "torn" because that is not the term that is——

Q. You did put "torn" in at the time that you made this? A. In the anterior horn, yes.

Q. Torn medial meniscus?

A. That is correct, yes.

Q. You did put that in when you made this report?

A. Yes, sir. I am qualifying the expression in that it does not mean the type of tear I spoke of when I [37] reviewed the record in which there has been a complete split or tear of the cartilage.

Q. Oh, yes, Doctor, what was the reasonable value of your charges?—for this service?

A. I believe my operative fee on that was \$175 which you can compare with the King County Medical Service Bureau fee of \$160.00.

Mr. Poth: Thank you very much, Doctor.

Recross Examination

By Mr. Merrick:

Q. That was not paid by Mr. Cuadra?

(Testimony of John E. Stewart.)

A. Pardon me?

Q. Mr. Cuadra did not pay your surgical fee, did he?

A. No, that was paid by the insurance company.

Q. Under the compensation claim?

A. Yes, sir.

That is all that I have, your Honor.

The Court: You may be excused, Doctor.

(Witness excused.)

We will recess until 2:00 o'clock, p.m.

(Whereupon court was recessed until 2:00 p.m.)

(Court reconvened at 2:00 o'clock, p.m. [38])

The Court: The court will be convened.

HOWARD W. RICKETT

a witness called by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Howard W. Rickett.

Q. Where do you live, sir?

A. 4208 50th Avenue, N.E., Seattle 5, Washington.

Q. And are you a licensed and practicing physician and surgeon under the laws of the State of Washington?

A. Yes, I am.

Mr. Merrick: We will concede his qualifications.

Q. (By Mr. Poth): I would like to ask the

(Testimony of Howard W. Rickett.)

doctor his qualifications, if I may. Do you practice any particular specialty, Doctor?

A. Yes.

Q. What is that?

A. I specialize in orthopedic surgery and fractures.

Q. Do you maintain offices in this city?

A. I do.

Q. And are you by yourself or are you with other specialists? [39]

A. I am sharing office space with two other orthopedic specialists.

Q. Who are they?

A. Dr. E. M. Burgess and Dr. Roscoe Moseman.

Q. What preparation have you had for the practice of your speciality?

A. Following the usual one-year internship which I finished in 1941 I served five years as a naval officer, as a naval medical officer in the United States Navy; and three years of that time was spent in orthopedic work. The last year and one half I was chief of orthopedic surgery at the United States Naval Hospital at Bremerton, Washington. Following discharge from the service I spent two and one-half years in orthopedic residency training under the University of Washington Medical school. I was certified by the American Board of Orthopedic Surgery in 1952.

Q. And are you a member of any other societies or groups in connection with the practice of your profession, Doctor?

(Testimony of Howard W. Rickett.)

A. I am a member of the King County, State, and American Medical Associations, the Western Orthopedic Association, and the North Pacific Orthopedic Society.

Q. During the course of your practice did you have occasion to see and examine Santos Cuadra?—the plaintiff [40] in this case? A. Yes, I did.

Q. And when was the last time that you saw him?

A. The last time that I saw this patient was on May 16, 1955.

Q. That was yesterday? A. Yes, sir.

Q. Had you seen him on other occasions or on another occasion?

A. I saw him on one other occasion.

Q. When was that, Doctor?

A. That was on June 30, 1954.

Q. And when you saw him yesterday what did you find his condition to be with reference to his left knee and leg?

A. Do you mean as far as his diagnosis or do you want his physical findings?

Q. Well, you start in your own way, Doctor? Tell us all about it.

A. As far as his condition is concerned, his complaints at the time that I saw him were as follows: I have pain in my left knee and here——

Mr. Merrick: Your Honor, I am going to object to any subjective complaints. It is obvious from the preliminary examination that Doctor Rickett was not the attending physician. I think his diagnosis

(Testimony of Howard W. Rickett.)

and so forth [41] should be limited to what the objective findings were and not subjective.

The Court: Doctor, is your testimony going to be based upon the statement given you by the patient?

The Witness: Well, physical examination and X-rays are also taken into consideration, your Honor.

The Court: But the complaint he gave you is part of your foundation?

The Witness: That is necessarily a part of it in order to determine the exact points of possible injury or of difficulty.

The Court: I think the Court will have to overrule the objection.

The Witness: The patient complained of pain in his left knee and indicated over the inner and outer aspect of the knee joint, that is, on both the left and the right side of the left knee joint.

If I sit for a few minutes and get up and walk I have to stand for a while before I can start out because of the pain in my knee. Going up and down steps makes the pain worse. If I am walking on the level it doesn't bother me too much. I tried to work for two days and the knee became swollen, and also when I went to turn over in bed at night I had pain in the knee, and again he indicated exactly in the same area. [42]

The knee doesn't lock or catch. It does give way at times. I can walk several blocks and then I will take a rest for a while and I can go on in order

(Testimony of Howard W. Rickett.)

to keep the knee from hurting.

As far as his physical examination was concerned he exerted a moderate left-leg limp. It was obvious gross atrophy of the left thigh and calf muscles.

Q. Now, Doctor, I wonder if we can just stop at that point and if you could tell us what objective symptoms you saw of atrophy.

A. Well, the muscles were on gross inspection smaller on the left side, and on measuring the leg, which, incidentally, both legs are of equal length, I measured the thigh at 11 inches below a point, a fixed point on the pelvis. On the right side at this point it measured $18\frac{1}{2}$ inches, and at the same level on the left side, $17\frac{3}{4}$ inches, a decrease in size of $\frac{3}{4}$ inch at that point. Measuring 13 inches below the same fixed point on the pelvis, the circumference on the right was 17 inches; on the left at the same level it was $15\frac{7}{8}$ inches, which gives a difference of $1\frac{1}{8}$ inches.

The measurement of the calfs taken 23 inches below the same point on the pelvis on the right measured 17 inches; on the left at the same level, $15\frac{7}{8}$ inches. [43]

Q. That would be a difference of—

A. I beg your pardon. I misread this; pardon me. On the right it was $15\frac{1}{4}$; on the left at the same level, $14\frac{1}{4}$, which is 1" difference.

Q. Is that within normal limits, or otherwise, Doctor?

A. No. I would say that was definitely outside the normal limit.

(Testimony of Howard W. Rickett.)

Q. What degree of atrophy, if you are able to estimate a "degree" in relation to this patient?

A. I would say anything up to $\frac{1}{2}$ inch, between $\frac{1}{4}$ and $\frac{1}{2}$ inch is within normal limits. A $\frac{1}{2}$ inch difference would be within normal limits.

Q. All right now assume that in August of 1954 the measurements had only been a half inch, what would the increase if any that you have testified to signify to you, if anything?

A. Well, I would say that there had been a gradual shrinkage of the musculature since that period of time.

Q. All right, you may proceed, Doctor, with the examination.

A. On further physical examination of the left knee there was noted the hockey thick shaped surgical incisional scar over the inner joint line on the left. This was somewhat widened but well healed. There appeared to be slight swelling of the left knee joint as compared with the right. On palpation there was tenderness [44] over the medial and lateral joint line on the left. That is on the inner and the outer side of the knee. There was no other detectable tenderness about the knee joint. There was some crepitus, or grating, beneath the knee cap. This was about equal on both sides and was not painful on either side.

I could not definitely detect any increased fluid within the knee joint. The range of motion on the left, the patient was able to flex his knee to 50 degrees, and on the right to 30 degrees, which indi-

(Testimony of Howard W. Rickett.)

cates 20 degrees limitation of motion of the left knee on flexion. There appeared to be full extension on both sides.

On the extreme of flexion the patient complained of pain over the lateral aspect of the knee joint. That is on the outer side. There was no gross relaxation of the anterior and posterior cruciate ligament on the left as compared with the right. There was questionable slight relaxation of the medial collateral ligament on the left. No pitting edema was present over the lower leg. I could detect no unusual crepitation or grating within the knee joint on repeated passive flexion and extension. But the patient did complain of pain over both sides of the joint on carrying out this particular motion. X-rays were taken then [45] which consisted of "A.P.," lateral, and notch views of both the right and the left knee, the right knee being—

Mr. Merrick: (Interposing) Will you state for the record what was the date of these X-rays?

The Witness: These X-rays were on May 16, 1955. The right knee was taken for comparison with the left knee. There was seen some sharpening of the tibial spine on both the right and left sides. The body pulled bilaterally. I could see no marked amount of arthritic change on either side as would be evidenced by overgrowth of the bone of the femoral condyle and also the tibial plateau.

The density of the bone on each side of the joint line on the left side was decreased considerably as compared to the right. There had been some im-

(Testimony of Howard W. Rickett.)

provement in this condition, however, from the views taken in the previous examination of June of 1954. There was no particular narrowing of the joint space on either side. In the inter-condylar notch of the medial femoral condyle there appeared to be some roughness of the articular margin. That completed the examination in this case.

Q. What conclusions, if any, did you draw from your examination? [46]

A. It was my opinion that the patient had some evidence of a tear of the lateral meniscus. I was also of the opinion that he had evidence of a chronic type of synovitis and early hypertrophic change of the medial femoral condyle.

Q. What is synovitis, Doctor?

A. That is inflammation of the lining of the joint.

Q. Was that present in both knees or just in one knee?

A. I found no evidence of that in the right knee.

Q. Now did you form any conclusion as to the cause of this synovitis?

A. It was my opinion that the synovitis might be well due to two conditions, (1) the original alleged injury to the medial meniscus which was subsequently removed at surgery. The injury to that meniscus, and the subsequent surgery producing a certain amount of irritation, but the major cause at the present time I felt to be on the basis of injury to the lateral meniscus, and probably a tear of the lateral meniscus.

(Testimony of Howard W. Rickett.)

Q. Doctor, what does the medical expression, "torn medial meniscus" mean?

A. To me it would mean or indicate a traumatic event causing a separation of the fibers of the medial meniscus.

Q. What is a cause of a yellowing of a meniscus? [47]

A. Well, there might be several causes of that. One, would be advancing age with degeneration. The other cause would be hemosideran deposits, which is an iron compound derived from blood, which might well have been in the knee joint as evidenced by the marked swelling which he alleges at the time of the injury, and as a result of that blood being within the joint gradually being absorbed and before it was absorbed the red corpuscles breaking down liberating hemosideran and depositing it in the cartilage, all of the cartilaginous structures actually and it was also possible to have evidence of it in the synovia of the joint, the lining.

Q. Doctor, in the absence of a trauma injury or some other outside effect is it common for one knee only to degenerate with age as distinguished from the other knee? Or would they both tend to degenerate equally in the absence of outside cause?

A. In the absence of outside cause it would be my opinion that the knees should degenerate about equally. However, it is very difficult to make any statements in that regard because there are too many factors, none of them being a major injury but numerous small injuries along the way of life,

(Testimony of Howard W. Rickett.)

so that it is difficult to pin it down to actual degeneration. [48]

Q. Do you have those X-rays with you, Doctor, that you took yesterday? A. Yes.

Q. I wonder if you could please indicate to the court the loss of density which you have described to us, Doctor?

Mr. Merrick: Are you going to introduce those in evidence?

Mr. Poth: Yes, I had probably better introduce them.

A. This is the left knee and this is the right knee.

Mr. Poth: Will you mark these for identification please?

Mr. Merrick: Were these X-rays taken under your supervision, Doctor?

The Witness: Yes.

Q. Did you form any opinion as to the cause of the loss of density?

A. It was my opinion that that could be caused by the continued mild inflammatory process that was present within the knee joint, and also, secondly, to disuse as far as the extremity was concerned.

Mr. Merrick: As far as what was concerned?

The Witness: The extremity.

(Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6 inclusive, marked for identification.) [49]

Q. Showing you what have been marked for identification as Plaintiff's Exhibits, Nos. 1, 2, 3, 4,

(Testimony of Howard W. Rickett.)

5, 6, I wonder if you please describe to the court and show to the court what you found there in regard to the condition of that knee.

The Court: Is there any objection to these exhibits?

Mr. Merrick: When were these taken?

The Witness: They were taken yesterday.

Mr. Merrick: No objection.

Mr. Poth: I will offer Plaintiff's Exhibits Nos. 1 to 6 inclusive in evidence.

The Court: Plaintiff's Exhibits Numbers 1, 2, 3, 4, 5, 6 may be admitted in evidence.

(Plaintiff's Exhibits 1 - 6 received in evidence.)

The Witness: Do we have a shadow box?

The Court: We haven't a shadow box here.

The Witness: Well, I think possibly I can show it with these lights. It makes it a little difficult, however, that is, from the standpoint of showing this up properly.

Exhibit No. 2 is an antro-posterior X-ray of Mr. Cuadra's right knee taken in my office on 5-16-55 under my direction and supervision. [50]

Plaintiff's Exhibit No. 4 is a duplicate view of Mr. Cuadra's left knee taken in my office and under my supervision on 5-16-55.

This view is a view of the left knee, which is the one in question.

This is the right knee which is the normal size and in looking at these one can see that there is considerable darkness of the bone right in this area

(Testimony of Howard W. Rickett.)

and then it becomes lighter. Also there is darkness along in this area and the bone then looks lighter in here. If we compare it with this side one does not see this mottled dark and light appearance in this area, and one does not see it particularly in the femur. The dark areas indicate that the bone is less dense at that point allowing more of the X-rays to go through and reducing more the silver substance on the film making it darker. The denser areas are the whiter points which we see which cut out more of the rays, so that this mottling dark appearance indicates softness of the bone. In other words, there is less calcium in the bone at that point.

Q. From what you found this man's condition to be were you able to determine whether or not he has been able and is now able to return to his former occupation of agricultural and cannery worker?

A. From my examination and findings it would be my opinion [51] that at this present time at least he would not be able to return to that type of work. The difficulties in the knee would preclude any return to that.

Q. What is your prognosis and recommendation, if any, as to future treatment?

A. Prognosis is very difficult on this. I would be very guarded in saying that this knee would ever return to a completely normal state and be without some degree of difficulty due to the long continuance of the symptoms and difficulties. As far as

(Testimony of Howard W. Rickett.)

treatment is concerned it is my opinion that the knee joint should be explored with the idea of removing the lateral meniscus, carrying out a long period of building up of the muscles which are now pretty well atrophied and attempting to eradicate any pathology that is found within the knee joint at the time of surgery.

Mr. Poth: I have no further questions. Thank you, Doctor.

Cross Examination

By Mr. Merrick:

Q. Doctor, this report that you have been reading from is based solely on your examination of yesterday, is it not? A. Yes.

Q. You don't have a report on your prior examination? [52] A. Yes, I do.

Q. Well, were there any significant changes between your first report and your second report?

A. The major significant change was the increase in atrophy which he had in the muscles of that leg.

Q. May I look at your original report. Now, you first saw him when? Was it June 30, 1954?

A. I believe that is correct. You have my report there.

Q. Was he referred to you by Mr. Poth?

A. Yes, he was.

Q. And how long an examination did you make at that time? How long did it take you?

A. Well, I didn't time it exactly. Usually an

(Testimony of Howard W. Rickett.)

examination of that type takes at least an hour and possibly longer.

Q. Now generally where there has been an operation for the removal of a cartilage are there certain exercises that are prescribed to build up the muscles? A. Ordinarily, yes.

Q. This atrophy could be accounted for a failure to take those exercises, could it not?

A. Not entirely, no.

Q. Well, a great deal of it could be explained by that, if the patient failed to follow the surgeon's directions and did not take any exercise, is that correct? A. In part, yes. That is correct.

Q. Now actually outside of June 30 and yesterday those are the only two times that you have seen this man? A. That is correct.

Q. Now, I believe you testified that there is no increased fluid in the knee joint, is that correct?

A. That is correct.

Q. An increase of fluid would indicate what?

A. It would indicate two things. One, marked irritation of the lining of the joint, producing increased production of joint fluid. And in addition to that, decreased absorption of the fluid from the knee joint, so as to cause the fluid, the increased production and the decreased absorption would cause fluid to collect within the joint.

Q. In other words, an increase in fluid could be caused by irritation?

A. Yes, it could.

(Testimony of Howard W. Rickett.)

Q. And you found no increase in the fluid in the knee joint? A. No, I did not.

Q. Now, as far as the X-rays are concerned I believe you testified that there was no narrowing of the joint spaces, is that correct?

A. No, at least what I would consider, significant narrowing. [54]

Q. Now when you examined him on June 30, 1954, your report indicates that there was no tenderness to light palpation over the scar. That would be the medial side of the knee, is that right?

A. Yes, the surgical scar, that is just light palpation in order to——

Q. (Interposing) Was there a complaint of tenderness on your last examination yesterday?

A. Not on light palpation, no. In other words, the scar tissue itself was not tender.

Q. Now what were the distances of these measurements on his thigh? Do you have those on your report that is in front of you? The first of all of these measurements were taken yesterday, were they not? A. That is correct.

Q. And the first measurement of the thigh, where was that taken in relation to the distance from the pelvis? A. Eleven inches.

Q. How about the second one?

A. Thirteen inches.

Q. Now, in your report of June 30, 1954, you indicated that at the 13-inch level, the measurement for the right leg was 17½", is that correct? Do you

(Testimony of Howard W. Rickett.)

have a copy up there of the June 30, 1954, report?

A. No, I don't. You have my copy. [55]

Q. Did you make these measurements yourself?

A. Yes.

Q. On June 30 the right measured $17\frac{1}{2}$ " and the left $16\frac{3}{4}$ ", with a $\frac{3}{4}$ " difference, is that correct?

A. Three-quarters inch at that time.

Q. That could be normal in an individual who had a cartilage removed and who hadn't had proper exercise, isn't that possible?

A. You can't call that normal at any time.

Q. Well, isn't there a difference in the circumference of a thigh of a person who is left-footed and one that is right-footed?

A. There might be; there might not be.

Q. It is not uncommon, is it?

A. It is not uncommon, no.

Q. That is also true of the arms and of the rest of the members of the body?

A. Yes. More so of the arms than of the lower extremities, however.

Q. You rated as permanent partial disability at 10 per cent, is that correct?

A. At that time I did, yes.

Mr. Merrick: That is all we have.

Redirect Examination

By Mr. Poth: With respect to his left knee, was his [56] condition yesterday different than it was before when you saw him a year ago?

(Testimony of Howard W. Rickett.)

A. I would have to have my other report in order to answer that.

Q. I have the two reports here, one of June 30, 1954, and one of May 16, 1955.

The Court: What is your question, Mr. Poth?

Q. (By Mr. Poth): My question was with respect to his left knee, was his condition different yesterday when he saw him than it was when he saw him a year ago? That is, on June 30, of 1954?

A. From the standpoint of the muscular atrophy I would say that his condition was somewhat worse than it was on the previous examination. His complaints as far as pain are concerned are essentially the same. The remainder of the physical findings, I would say, were essentially the same. As I have previously indicated, there was some improvement as far as the bone density is concerned.

Mr. Poth: I have no further questions, Doctor. Thank you.

Recross Examination

By Mr. Merrick:

Q. Doctor, if you had a patient who had been used to doing heavy work and if he laid off, say, for two years, there [57] is a possibility that atrophy would increase in a member that had been injured, would there not?

A. I think not. Not just from the standpoint of laying off of work. It would be more or less a symmetrical thing.

Q. Well, actually your findings as to a possible tear of the lateral meniscus, that is based primarily

(Testimony of Howard W. Rickett.)

on what he told you, isn't it?

A. No, not primarily. There are certain — I mean there is the location of pain and, well, I would say the location of pain. The history of this thing giving way on him at times substantiates that to a certain extent.

Q. That is based, of course, on what he told you, though? A. That is correct, as I said.

Q. For example in your report of June 30 in your conclusions you indicate that the possible tear of the lateral meniscus, the evidence is minimal and it is based on tenderness over the lateral joint line. Now that is just what he told you, isn't it?

A. Well, yes; that was his response to pressure of the finger over the lateral joint line.

Q. And he complained of pain?

A. Of tenderness at that point, yes.

Q. Purely subjective? [58]

A. In the true sense of the word, yes.

Mr. Merrick: I have no more questions.

Redirect Examination—(Continued)

By Mr. Poth:

Q. Are you able to detect any spasms in a case like that, Doctor?—to indicate a nervous response to pain?

A. Well, there is, I mean there is a response to pain, a tendency for an individual to try to pull his leg or whatever you are examining out from beneath the finger that is producing it, and that was present in this case.

(Testimony of Howard W. Rickett.)

Mr. Poth: I have no further questions.

Recross Examination—(Continued)

By Mr. Merrick:

Q. Well, a spasm is involuntary, isn't it?

A. I was not speaking of spasm. I was referring to, as I said, the patient pulling the extremity or the part examined out from beneath the examiner's finger in order to get away from the pain which might be produced.

Q. I see. That is purely——

A. (Interposing) I was not referring to spasm per se.

Q. There was no indication of any spasm in your report of June 30, is there? A. No.

Mr. Merrick: That is all. [59]

Mr. Poth: I have no further questions. Thank you, Doctor.

The Court: That is all, Doctor. You may be excused.

The Witness: Thank you, sir.

WILLIAM C. PRICE

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. William C. Price.

Q. Where do you live, sir?

(Testimony of William C. Price.)

A. I live at Route 4, Box 282, Kirkland, Washington.

Q. During the fishing season of 1953 would you tell us whether or not you were employed aboard the Alaska Queen in Bristol Bay, Alaska?

A. Yes, I was.

Q. And in what capacity were you aboard that ship?

A. Storekeeper. I was the storekeeper.

Q. Did you live aboard the ship?

A. Yes, I did.

Q. Did you eat aboard the ship?

A. Yes. [60]

Q. Do you know whether or not Santos Cuadra was likewise aboard that ship?

A. Yes, he was.

Q. And what were his duties, if anything, aboard her?

A. He worked on the canning of the salmon and cleaning the ship after they finished their canning, it was usually his duty. He was one of them that steam-cleaned all of the canning equipment and inside of the ship.

Q. And on the 20th day of July, 1953, where was the Alaska Queen, if you know?

A. Well, it was in the Bristol Bay area anchored up in or tied up in a slough.

Q. Was she in navigable water at that time?

A. Yes.

Q. And what was this slough; is that part of a river, or something?

A. It was the back waters from the bay.

(Testimony of William C. Price.)

Q. Was there a barge alongside the ship that day?

A. I don't remember particularly whether it was that day or not, but I know that quite often there were barges there.

Q. Well, do you remember the day that Santos Cuadra was injured? A. Yes.

Q. Was there a barge alongside of the ship that day? A. Yes, there was. [61]

Q. What was being done with the barge, if anything?

A. It was being loaded with salmon.

Q. Was that canned salmon in cases?

A. Yes.

Q. Did you have occasion to see that barge that day? A. Yes, I saw it.

Q. I wonder if you could describe this barge to us.

A. I didn't take any measurements of it, but I would say roughly it was, oh, twenty feet wide, give or take a few feet one way or the other, and maybe fifty feet long.

Q. Where was she tied, and what was she tied to?

A. She was tied alongside of the Alaska Queen.

Q. Was the barge in navigable water?

A. Yes.

Q. What sort of a flooring, if any, did she have in her?

A. Well, it had just the regular deck flooring that boats normally have.

(Testimony of William C. Price.)

Q. All right, now, was there anything placed on that deck flooring?

A. Well, they put the salmon in, but prior to that they put some kind of lumber or something to put the salmon cases on, to keep the salmon out of the water.

Q. Was there water in the bottom of the ship, of the barge?

A. I don't know whether there was in that boat at that time but I know there was danger of water getting in there. [62]

Q. Now would you please describe this wood or lumber whatever it was? Will you please describe what it was made up of and how it looked?

A. Well, it wasn't anything of any standard description. It was more or less, it wasn't the regulation, the regular pallet boards that we had been using to load them with. It was just pieces of lumber, more or less.

Q. And describe how the pieces were, and what condition they were in?

A. Well, they were fitted in as close as they could be, but not having been made for that particular purpose they wouldn't fit properly.

Q. What sizes were they, if you recall?

A. No standard size. They were various sizes, from two feet to four feet.

Q. What widths?

A. I would say various widths too.

Q. Were they secured in any way?

(Testimony of William C. Price.)

A. Not to the bottom of the boat. They weren't nailed.

Q. Did you have occasion to walk on them?

A. Yes, I walked across them several times.

Q. How was the footing?

A. Well, if you were careful and if you weren't loaded it was all right, but I wouldn't care to walk across them loaded. [63]

Q. Why was that?

A. Well, they were placed in such a way that if you stepped on them and you would lose your balance by tipping one.

Q. What do you mean by "loaded"?

A. By you yourself, if you weren't carrying something in your arms, such as these men workers were carrying; they were carrying cases, and sometimes two cases of salmon.

Q. Do you know where this wood came from that was there?

A. I don't know where it came from originally. I know prior to it being put on the barge that it was over in the warehouse that was maintained on the bank.

Q. How did it get on the barge?

A. Well, as well as I remember, the natives, I think, or some of the Eskimos that were working there carried most of it over.

Q. Where did they carry it to, the barge or the Queen?

A. They had to carry it through the Queen in order to get to the barge.

(Testimony of William C. Price.)

Q. Where did you live and eat when you were there? A. On the Queen.

Q. Where did Mr. Santos Cuadra live and eat?

A. On the Queen.

Q. Did Mr. Cuadra do any work ashore while you were there? A. I never saw him ashore.

Q. Did you see Mr. Cuadra get injured?

A. No, I didn't.

Q. Did you see him on that day that he was injured? A. Yes, I did.

Q. After he had been injured? A. Yes.

Q. What was his condition?

A. His knee had swollen quite badly and it had turned or discolored very badly.

Q. What color did it turn to?

A. A dark blue on the first day and then it developed into a yellowish, greenish color.

Q. And how big did his knee get?

A. His knee got almost as big as my head.

Q. And where was he when you first saw him after he was injured? A. Where was he?

Q. Yes.

A. He was in his bunk on the Queen.

Q. Where was his bunk?

A. It was on the Queen.

Q. And did you have any conversation with him?

A. Yes, he told me that he had hurt his knee, and I looked at it. And what little knowledge I have of treating those things I knew or I thought that putting hot packs [65] on it would help, which I did do, put hot towels with salt water and vinegar

(Testimony of William C. Price.)

which I had heard were good for those things, and I did the best I could to treat him.

Q. How long did he remain in his bunk?

A. He remained there for quite a number of days. I don't recall exactly, but there was quite a few days he was there because every day I would bathe it several times for him and put the hot packs on it.

Q. Did he get up to go to his meals?

A. No, he couldn't get up at all.

Q. He couldn't get up?

A. No. He couldn't get up for his meals.

Q. How did he get food?

A. I don't know, whether he got any food or not.

Q. What effort did you or anyone make to get him medical care and attention?

A. I told Mr. Bendickson one time that he should go to a doctor while Mr. Bendickson was standing in the forecastle one day, and he said he was going to send him the next day to a doctor, to the hospital, but he never did.

Q. Did he send him the next day?

A. No, he did not. He said he was going to, but he didn't.

Q. Did he send anyone else to the hospital or a doctor? A. Yes.

Q. Who was that? [66]

A. He sent me and he sent one of the deckhands; I think he sent two of the deckhands; yes, two.

Mr. Poth: I have no further questions.

(Testimony of William C. Price.)

Cross Examination

By Mr. Merrick:

Q. What is your occupation, Mr. Price?

A. I am an accountant.

Q. Where are you employed?

A. At the present time I am employed by the Robert James Construction Company.

Q. Where are they located?

A. In Bellevue, Washington.

Q. Now, was this your first experience working in the canning industry? A. Yes, sir.

Q. How did you get up to Alaska?

A. I flew.

Q. You didn't ride on the vessel at any time?

A. No.

Q. Did you come back by air? A. Yes.

Q. Now, during all of the times that you were up there and the cannery crew was there was the floating cannery tied up? A. Yes. [67]

Q. And when the Filipinos left it was still tied up, was it not? A. Yes.

Q. Now you say that these boards were the standard type of boards used in barges?

A. I would say they were not.

Q. They were not?

A. Yes, that is right.

Q. Had you ever witnessed a cannery operation in Alaska before? A. No.

Q. You say that it was dangerous to walk on these boards? A. Yes.

Q. Did everyone know that?

(Testimony of William C. Price.)

A. Mr. Bendickson should have known it; he fell down the day prior to that.

Q. I will move to strike the answer as not responsive.

The Court: The answer may be stricken.

Mr. Merrick: Will you read back the question, Mr. Reporter?

The Court: The Reporter will read the question.

(“Q. Did everyone know that”?)

A. Did “everyone”? I don’t know whether everyone knew that or not.

Q. Well, did the Filipino crew know that that were working on the barge? [68]

A. I never went around asking them if they knew it, no. I didn’t know whether they did or not.

Q. Now did Mr. Bendickson have trouble up there with you because of your drinking?

Mr. Poth: I will object.

Mr. Merrick: I think that it is proper to show bias or interest in this witness.

The Court: The objection is overruled.

A. What do you mean by “trouble”?

Q. Well, were you drunk and passed out for several days at a time while you were up there?

A. I was not passed out, no.

Q. Were you drunk on the job several times?

A. Yes.

Q. You weren’t hired back last year, were you?

A. I beg your pardon?

Q. You weren’t hired back last year, were you?

A. No.

(Testimony of William C. Price.)

Q. Now, you say that he was in his bunk for several days. What do you mean by "several days"?

A. Two or three days and more or less.

Q. And then the cannery crew all flew back to Seattle, didn't they?

A. They didn't go back with me. I saw them get on the airplane and go to Dillingham. And where they went from [69] there I don't know.

Q. Well, this was right at the end of the season, wasn't it?

A. Yes.

Q. And they all were taken out and flown directly back to Seattle, weren't they?

A. I don't know where they went to. The airplanes came to the Queen and look them to Dillingham, as far as I know; and where they went from there I don't know.

Q. Well, Mr. Cuadra left with the rest of the Filipinos, didn't he?

A. Yes.

Mr. Merrick: That is all.

Mr. Poth: I have no further questions.

(Witness Price excused.)

VEANCIO DIEMPO

a witness called by the Plaintiff, being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Soriano:

Q. Will you state your full name, please?

A. Veancio Diempo.

Q. And where do you live, Mr. Diempo?

A. I live in Ketchikan, Alaska.

(Testimony of Veancio Diempo.)

Q. In Ketchikan, Alaska? A. Yes. [70]

Q. Mr. Diempo, were you employed on the Alaska Queen in the summer of 1953?

A. Yes, sir.

Q. And what was your employment or your duties on board the Alaska Queen?

A. Mr. Benediction.

Q. No, what type of work did you do?

A. General work.

Q. General work? I see. Did you have any particular job that you did or that you were hired for?

A. Yes, I go as catching cans.

Q. "Catching cans"?

A. Yes, sir. Catching the cold cans——

Q. That is catching the cans as they come off of the line?

Mr. Merrick: He is a can catcher.

Q. Okeh. And on or about July 20, 1953, did you happen to observe an accident in which Mr. Cuadra was injured? A. Yes, sir.

Q. And where were you standing at the time?

A. The place where we were working in the scow.

Q. I didn't hear you.

A. I mean in the scow, the place where there was the accident.

Q. He was on the scow? A. Yes. [71]

Q. Where were you? A. I was there.

Q. On the scow or on the ship?

A. On the scow.

(Testimony of Veancio Diempo.)

Q. On the scow. Were you close at hand so you could observe what happened?

A. Yes, I helped him.

Q. I see. Describe just how Mr. Cuadra was injured, just how he got hurt?

A. First, I saw where the stakes tip overs and hit his knee. Then he fell down and I come to him and lift him over and bring him to the side because it take us about ten minutes because he was kind of unconscious.

Q. Pardon? A. He was very——

Q. (Interposing) Unconscious?

A. (Continuing) ——unconscious in ten minutes——

Q. I see.

A. And then after, after ten minutes I bring him up to the ship and go into his bed.

Q. Now, could you describe the type of board that hit him in the leg there? A. Yes, sir.

Q. What did it look like?

A. The board was three feet long and about three feet wide. [72]

Q. I see. Was it the same as the rest of the boards on board the scow?

A. No, it was a different size. Some are short, some are long.

Q. In other words they were random, at random?

A. Yes, they were all different sizes.

Q. Now this barge that was tied up alongside of the Alaska Queen, had it been brought in? How did it get alongside of the Alaska Queen?

(Testimony of Veancio Diempo.)

A. I am sorry. I didn't get that.

Q. Pardon me?

A. Pardon me, I did not get that question.

The Court: He did not understand your question.

Q. How were these barges brought back and forth alongside the Alaska Queen?

A. We tied up along the ship.

Q. Were they brought in by tug boats?

A. Yes, they were brought in by the tug boats.

Q. By the tenders? And was there ample water for the barges and the Alaska Queen at all times in this landing or lagoon in which the Alaska Queen was anchored?

A. Yes, sir.

Q. In other words, the Alaska Queen was in navigable waters?

A. Yes.

Q. Where did you stay while you were on the Alaska Queen? [73]

A. In the ship.

Q. On the ship? And to your knowledge was Mr. Cuadra there too?

A. Yes, sir.

Q. And where did you eat?

A. On the ship.

Q. On board the vessel?

A. Yes, sir.

Q. Was the food prepared on board the vessel for you? Was the food cooked on the ship for you?

A. Yes, sir; on the ship.

Q. I see. How long have you been in the salmon industry?

A. How long have I been?

Q. How long have you worked canning salmon?

A. Oh, it was about two months in there, a couple of months in there.

Q. I didn't understand you?

(Testimony of Veancio Diempo.)

A. I mean about two months there.

The Court: Two months a year?

The Witness: Two months a year in that place.

Q. How many years have you worked?

A. Oh, do you mean including the outside work?

Q. Yes. No, no.

A. Oh, just for the Alaska Queen?

Q. No. How many years have you worked in the salmon industry up north in Alaska? [74]

A. Oh, I have been working about nine years in the fish industry.

Q. Nine years. Had you been on the Alaska Queen prior to 1953?

A. No, that is the first year I worked in that——

Q. (Interposing) That is the first year?

A. (Continuing) ——was 1953.

Q. Had you ever worked in the Bristol Bay area before? A. Yes, I worked.

Q. Where?

A. In the Alaska Packers Company.

Q. I see. Were you familiar with loading barges; when you were working with the Alaska Packers did you load barges for them?

A. No.

Q. You didn't? A. No.

Q. After Mr. Cuadra was injured did you observe his leg? Did you see his leg?

A. Yes, sir.

Q. What was the condition of it?

A. Oh, it was very swelled up. It was swelled up very, awful big.

(Testimony of Veancio Diempo.)

Q. How long had you been working on these barges alongside of the Alaska Queen?

A. Oh, I worked two months in there. [75]

Q. Had you noticed the type of dunnage or platforms they had been using on the barge, this particular barge that Mr. Cuadra was injured on?

A. Yes, sir.

Q. To your knowledge had anyone else been injured, or not injured, but had anyone else fallen because of the type of dunnage that was used, and, if so, who was it?

A. Yes. I see Mr. Benediction—fell down, almost fall down.

Q. That was on the same barge?

A. On the same barge.

Q. Was that before or after, I mean, Mr. Cuadra? A. That was just before.

Q. That was before? A. Yes.

Q. Was anything done to prevent people from being injured? A. No.

Q. Mr. Diempo, you say that you were a can handler, and you worked on board the Alaska Queen in the cannery line itself mostly. How was it that you happened to be on the barge—loading the barge?

A. Do you mean the Queen, the Alaska Queen?

Q. How was it that you happened to be going onto the barge to work? Who told you to go onto the barge? A. Oh, Mr. Benediction. [76]

Q. You went onto the barge under his directions and order? A. (No response.)

(Testimony of Veancio Diempo.)

Q. And——

Mr. Merrick: He didn't answer the question.

The Court: Do you understand the last question?

The Witness: What is the last question? Pardon me; I never got that, please.

Q. You went under his orders onto the barge to work? A. Yes, sir.

Q. And when you arrived on board the barge were there any other orders in regards to preparing the barge for loading the salmon and stowing the salmon? A. No.

Q. Well, who told you to put the dunnage on the barge? A. Mr. Benediction.

Q. I see. Did he discuss the reason for putting it there? A. Yes, sir.

Q. What was it?

A. He says, "We put all the scrap boards all over the scow."

Q. "All these scrap boards" did you say?

A. Yes, scrap boards all over the scow; so we put the boards all over the scow before we piled the cases of salmon.

Q. That was to keep the water away from the salmon, I presume? A. Yes, sir. [77]

Mr. Soriano: I have no further questions.

Mr. Poth: That is all.

Cross Examination

By Mr. Merrick:

Q. When you worked in this barge, Mr. Diempo, you got extra pay for that, didn't you?

(Testimony of Veancio Diempo.)

A. Oh, yes; we had the extra pay.

Q. Yes. That was under your cannery workers contract?

A. Yes. It was considered overtime.

Q. Yes, it is considered overtime? In other words, you had no complaint about doing that type of work. You got extra pay for it, didn't you?

A. Yes.

Q. Now how long did you say that you have worked in canneries in Alaska?

A. Nine years now.

Q. And you have often stacked salmon when you worked in canneries, haven't you?

A. Stacked salmon? What do you mean "stacked salmon"?

Q. Stacked cases of salmon?

A. Oh, yes, pile salmon; yes—yes, sir.

Q. You always do that in a cannery?

A. Yes, we do that through piling.

Q. Now, how did you happen to get your job with Mr. Bendickson? [78]

A. Well, the inside of the cannery, the Filipino, what they call the Filipino foreman, that is the guy who hired me that I got a job at Mr. Benediction's cannery.

Q. And then you were dispatched out of the cannery workers union? A. Yes, sir.

Q. That is the A. F. of L. Union?

A. Yes, sir.

Q. And you worked under this Filipino foreman on the cannery? A. In the cannery.

(Testimony of Veancio Diempo.)

Q. Now you say that you saw Mr. Cuadra injured? A. Yes, sir.

Q. And you say that he was hit in the leg by a board three feet long and three feet wide?

A. Yes, sir.

Q. How did that happen? Would you describe to the court just how that happened?

A. Yes, sir. First the board fly over and it hit the knee of Mr. Cuadra and then after that he fall down, and then I come and lift him over and bring him up and bring him to the side.

Q. Did Mr. Cuadra step on this board first?

A. Yes, sir.

Q. And then this board three feet wide and three feet long, or three feet square flew up and hit him in the knee, is that it? [79] A. Yes, sir.

Q. Where did he step, in the middle of the board? A. Right to the end.

Q. To the end? What part of his knee was struck? A. What——?

Q. Did he strike the front part of the knee or the side or the inside?

A. That side, yes; that is the place in there, right here (indicating).

Q. You indicate that it hit him on the outside of the leg?

A. This side, on the side of his leg. (Outside right side.)

Q. Now what time of the day did this accident occur?

A. Three o'clock; a quarter past three.

(Testimony of Veancio Diempo.)

Q. A quarter past three? That is in the afternoon?
A. Yes, in the afternoon.

Q. What time had you started to work that morning in the barge?

A. We started to work at eleven o'clock.

Q. Eleven o'clock?
A. Yes.

Q. Wasn't it seven o'clock?

A. No, we worked first in the fish. We were canning the fish first. After we got through then we started working the scow.

Q. Well, you say you started about eleven? [80]

A. Well, I could not remember exactly. I could not tell exactly what time that we started loading the salmon.

Q. You had worked several hours before it happened, though?

A. Yes, we worked several hours before it happened, yes.

Q. Now you say you ate on the ship?

A. Yes, we ate on the ship.

Q. There was no place to eat on the beach, was there?
A. No, none.

Q. Now when you were working in the cannery line you also worked with several of the natives that worked in the cannery, didn't you?

A. No.

Q. You worked with some of the residents, didn't you, the natives?

A. No, we was under the ship, we worked on the ship not on another place.

(Testimony of Veancio Diempo.)

Q. No, but I mean the natives also worked with you canning fish, don't they?

A. No, the natives didn't work canning fish. They worked in the warehouse.

Q. And they also worked in the barge?

A. I don't know if the natives were working in the barge in there.

Q. Now the Filipinos are considered nonresident cannery workers, weren't they? A. Yes, sir.

Mr. Poth: I will object to that question.

Q. Well, do you know what "nonresident" means? A. Yes, I know.

Q. Those are the Filipinos that come up from Seattle? A. Yes.

Q. And also the resident cannery workers, the Indians, they also work with you fellows canning fish, don't they? A. Yes, sir.

Q. They work right with you in the cannery line, don't they? A. Yes.

Q. And they also work with you doing work like stacking salmon in the barge, don't they?

A. Oh, I don't know. I could not tell exactly if they work with us during loading salmon.

The Court: What was that answer? Did they or didn't they? Do you recall?

The Witness: Oh, I should say they work with us.

Q. You all work together up there when you are up there? A. Yes.

Q. How many people were working in the barge this day that Mr. Cuadra was injured?

(Testimony of Veancio Diempo.)

A. In the barge?

Q. Yes.

A. Well, about eight or nine, I think—nine.

Q. How many Indians or natives were working with you at that time—if you know? [82]

A. Well, there was about one, I think, one; but I could not tell exactly how many; one—one for sure.

Q. They were changed sometimes. Sometimes there would be more and sometimes less, is that right?

A. Yes.

Q. Did you work with Mr. Cuadra last year? In 1954?

A. No, I don't work.

Q. You didn't work at all?

A. No, I don't work with him, with Mr. Cuadra last year.

Q. Do you know where he worked last year?

A. Yes, I worked last year.

Q. Where did Mr. Cuadra work last year?

A. I don't know.

Q. Do you know if he worked?

A. No, I don't know where he worked. I stayed in Ketchikan. That is my resident town, Ketchikan, Alaska.

Q. You worked up in Ketchikan last year?

A. Yes.

Q. Do you know where Mr. Cuadra worked last year?

A. No.

Q. Do you know if he worked?

A. No.

Q. You don't know if he worked?

A. I don't know.

(Testimony of Veancio Diempo.)

Q. Do you know if he worked last winter? [83]

A. No.

Q. You don't know. You haven't seen him then since 1953? A. No.

Q. (Continuing) —I gather?

A. That is only in 1953 that we worked together.

Mr. Merrick: That is all.

Mr. Soriano: Just one question is all.

Redirect Examination

By Mr. Soriano:

Q. Could you tell me, Mr. Diempo, did the natives in the Bristol Bay area sleep on board the vessel with the crew members? A. No.

Q. I see. Did they eat on board the vessel—with the crew members? A. Yes, they eat.

Q. They ate sometimes? A. Yes.

Q. But they didn't stay on the vessel?

A. No.

Q. They had their own quarters ashore?

A. Yes, sir.

Mr. Soriano: That is all.

Recross Examination

By Mr. Merrick:

Q. Well, there were no rooms for the natives to sleep on the [84] vessel, were there? A. No.

Q. There was no room for them?

A. No room for the natives.

Q. And some of them are married and have their families right there in the Bristol Bay area, don't they?

(Testimony of Veancio Diempo.)

A. Oh, I don't know if some of them are married.

Mr. Merrick: That is all.

The Court: That is all. You may be excused.

(Witness excused.)

We will take a recess at this time.

(15 minute recess.)

The Court: The court will come to order. You may proceed.

Mr. Poth: I would like to call Mr. Erling H. Bendiksen as an adverse witness at this time, if your Honor please, he being the party-defendant.

ERLING H. BENDIKSEN

a witness called by the plaintiff as an adverse witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Erling H. Bendiksen. [85]

Q. Where do you live, sir?

A. Oh, I live part of the time in Seattle and part of the time in Pacific County.

Q. What is your home residence?

A. Well, my home residence is Ocean Park at Pacific County.

Q. You are one of the defendants named in this action?

A. Yes.

Q. You were operating the Alaska Queen in 1953?

A. Yes.

(Testimony of Erling H. Bendiksen.)

Q. Where did she spend the winter of 1952 and 1953? A. Where did I spend the winter?

Q. Where did the ship spend the winter?

A. Oh, here in Seattle.

Q. Whereabouts? Was that in Lake Union?

A. Yes, I think so.

Q. Whereabouts in Lake Union?

A. Well, if it was in Lake Union it was tied up at St. Vincent De Paul down here.

Q. At the St. Vincent De Paul Dock?

A. Yes.

Q. Did you rent moorage from the St. Vincent De Paul? A. Yes.

Q. How did the Alaska Queen get to Alaska? Did she go under her own power or was she towed?

A. Under her own power. [86]

Q. And what type of a vessel is the Alaska Queen?

A. Oh, it is sort of a barge-type shape, you know, but it is self-propelled with twin screws.

Q. Is she a converted L.S.T.? A. No.

Q. What was she before she was the Alaska Queen?

A. Well, that was before I got it. It was equipped as a boat when I got it and it was self-propelled.

Q. She was a what?

A. Well, I bought it as she is now at the time pretty much. We done some work on it, but it is a steel boat, like I say, kind of barge-shaped.

Q. What is her tonnage?

(Testimony of Erling H. Bendiksen.)

A. About 297 tons.

Q. Gross displacement, or what tonnage are you talking about?

A. I am talking about net tonnage.

Q. Net tonnage? A. Yes.

Q. What type of engines does she have aboard her? A. General Motors.

Q. Is that steam, or diesel, or what?

A. Diesel.

Q. And does she have any cargo carrying capacity? A. Yes.

Q. Does she have a hold aboard her?

A. Yes. [87]

Q. More than one?

A. Oh, yes. She has three cargo holds. And the rest of it is taken up with cannery machinery, and other machinery.

Q. Does she have decks on her? A. Yes.

Q. How many decks? A. Well, two decks.

Q. Do you have a weather deck?

A. Well, you might call the ship's, you might call it the "between" deck and then the "top" deck.

Q. And do you have crew's quarters aboard her? Did you have crew's quarters aboard her in 1953?

A. Yes.

Q. Did you employ Santos Cuadra for the 1953 fishing season? Santos Cuadra, the Plaintiff in this action?

A. Yes, he was employed as a cannery worker.

Q. When did you first put him aboard?

(Testimony of Erling H. Bendiksen.)

A. After the ship got up there we fly our cannery help up direct from here.

Q. Did you have him work on the ship here in Lake Union before he went up north?

A. I don't know. That would be a separate deal if he did. He might have. Sometime we do pick up extra help to do a little work.

Q. Now this barge that he was injured on, that also belonged [88] to you? A. Yes.

Q. What was the purpose of that barge?

A. Well, it was a regular standard barge used for transferring salmon from our place there to the ship, to the Alaska Queen, which is tied up, which is anchored in the main river. We were tied up in a more or less you might call it slough, up in from the main river where the ships would go.

Q. Is that navigable water, that slough?

A. Well, you might call it "navigable water," anything that boats can go up and down, I guess you would consider it.

Q. And did Santos Cuadra live aboard that ship while he was in your employ during the season of 1953?

A. Yes. We have one room on board we keep the Filipinos in and the cannery workers, and the rest of the cannery workers have stayed in shore, and that is all the cannery workers that live on board.

Q. Did you bring back any salmon aboard that ship, any canned salmon when you came south for the winter after the 1953 season?

(Testimony of Erling H. Bendiksen.)

A. Oh, yes; I expect we did.

Q. How many cases did you bring back?

A. I couldn't tell you unless I looked it up. I would have to look it up. [89]

Q. Were you loaded to capacity?

A. Yes, probably.

Q. And how many cases did that ship hold at that time when it was loaded to capacity?

A. Well, you ask me a question here. You see, we store our cans on board the ship for canning, and if you don't use up all of the cans we will have them left over and they will be part of the cargo, and the rest of the space we will load salmon on when we are ready to go south.

Q. Well, did you use up all of your cans in the 1953 pack?

A. Well, I don't remember. I think there were probably some cans left. There usually is.

Q. How many cases, approximately, of cans and tops, of flats and tops?

A. Oh, we probably had 10,000 left.

Q. Ten thousand cases?

A. Ten thousand cases, yes.

Q. Ten thousand cases of cans and tops?

A. Left, yes. I think that we canned about 40,000 cases and we probably had about 10,000 cases left over before we got through up there.

Q. You are not referring to square cases?

A. Well, I am referring to cases. Now I am talking about cases here, I am talking about cans enough for 10,000 cases. [90]

(Testimony of Erling H. Bendiksen.)

Q. Oh, yes. But not cases of knocked down cans?

A. No. You see, in that district or in practically all of Alaska all cans, empties, are shipped collapsed to Alaska, which is the only place they are shipped that way.

Q. But you did transport canned salmon back to Seattle aboard that ship?

A. There was some canned salmon and also some cans.

Q. Now, on the twentieth day of July, 1953, were you aboard the ship? That was the day that has been testified that Santos Cuadra was injured. Were you aboard the *Queen*?

A. Well, I probably was at the place. We managed to look after the tenders and the fish boats, and I expect I was there, at the time we loaded the salmon.

Q. Do you remember Mr. Cuadra being injured?

A. I remember he was hurt on the barge, but at the time——

Q. Did you see him that day he was hurt?

A. I think so. I think I probably did.

Q. Where was he when you saw him?

A. Well, I don't remember that.

Q. Now you were the general superintendent of all operations up there, weren't you?

A. Yes, pretty much.

Q. You ran the "show," in other words?

A. Well, you might say, yes. [91]

Q. You were, that is, to put it briefly, you were the "boss"? Is that right?

(Testimony of Erling H. Bendiksen.)

A. Well, to some extent. It works this way. When we are up there I am pretty much the boss, but as far as the ship goes I have nothing to do with the ship. They have a captain in charge of the ship, the ship's crew, but so far as the cannery and the management of the fish, I was in charge of that, of the canned salmon.

Q. Were you in charge of the loading of the barge? A. Yes, that was my responsibility.

Q. Now did you order Mr. Cuadra on that day that he was injured to load salmon, canned salmon on that barge?

A. I expect I probably told the Filipino foreman to get some help. That is common that the cannery workers sometimes help at longshore work. It is right in the agreement; we can call on them for longshore work.

Q. Did you supervise the loading of the barge?

A. Oh, to some extent. I probably didn't stay there all of the time, you know.

Q. But you were back and forth?

A. It isn't necessary. It is very common work. It is just very plain, common labor.

Q. Now did you order the men to dunnage off the barge before putting the salmon in?

A. I expect I did. It is a very common practice. [92]

Q. All right. Now what did you use for dunnage there that time?

A. Oh, we used some boards laid on top of the deck.

(Testimony of Erling H. Bendiksen.)

Q. What were these boards like? Would you describe them to us?

A. Well, they were, offhand it is hard to say. I think they were one-inch boards mainly. .

Q. One-inch boards? A. Yes.

Q. What sizes and shapes were they in?

A. Well, I think they were, they were probably various sizes in this particular case. I couldn't remember that.

Q. Now did you tell the men to lay those boards out over the floor of the barge?

A. Yes, I probably did.

Q. Now did you have the men lay stringers or cross pieces first and then lay the boards across the other way on top of them, is that what you did?

A. I don't think that we had any cross boards. I think there was only one layer of boards. That is the way it was done.

Q. Well, isn't that the customary practice in order to provide space in case water gets in to lay stripping first and then lay your dunnage over that? Isn't that the way it always works? [93]

A. No, not exactly. The ships, they use dunnage. It is very common. All ships use dunnage, and they use in many cases only single dunnage.

Q. But you don't remember whether you told them to put cross pieces there that day?

A. I don't remember. No, I don't.

Q. Do you remember falling down in the barge there on that—— A. Myself.

Q. Yes.

(Testimony of Erling H. Bendiksen.)

A. No, I don't remember that either, but——

Q. Would you say it didn't happen?

A. I don't say it didn't happen, but I say I don't remember it. It is two years ago almost now, and I don't remember if sometimes a person would——

Q. Now where did you get this wood that was used to floor off the skin of the barge there?

A. I think we probably got it from shore because the barge was used for fish.

Q. Well, how did it get up north?

A. Oh, we probably brought it up with our own equipment.

Q. You brought it up. And do you remember where you got it from when you were in Seattle?

A. No, I don't exactly remember.

Q. Did you order the men to pick it off of the dock at the Goodwill?

A. Off of the dock? What dock are you referring to? [94]

Q. The Goodwill Pier here in Seattle?

A. No.

Q. Do you remember being at the Goodwill Pier—pardon me, at St. Vincent de Paul, at St. Vincent de Paul Pier; do you remember that?

A. Well, we have a station in shore in which we have lumber up there right now, I mean, from year to year.

Q. Where is that?

A. In Bristol Bay, where we have our equipment.

(Testimony of Erling H. Bendiksen.)

Q. All right. Do you remember this particular year, 1953, when the ship was tied up at the Lake Union dock of the St. Vincent de Paul before you went north? Do you remember being there and telling the men at that time to go out and pick up this scrap lumber lying on the Goodwill dock, pardon me, on the St. Vincent de Paul dock?

A. I think I bought some lumber from St. Vincent de Paul, but I bought it and paid for it. I don't think, I don't know whether you would call it "scrap" lumber or not. You can call scrap lumber almost anything, I mean, as far as that goes. Ships have, all ships have dunnage, you know. They don't use first-class lumber for it. That is true.

Q. Have you ever used pallet boards in your barges to floor off with? A. No. [95]

Q. You have been to other canneries, have you not, in Bristol Bay and watched their operation?

A. Yes.

Q. What is a pallet board?

A. A pallet board is used in warehouses for lift trucks. It is referred to as a pallet board.

Q. They have them up there at Bristol Bay, do they not?

A. Yes. But they are not used on barges.

Q. Will you describe what they are like?

A. Yes, a pallet board is made from first boards on the bottom and then 2x4's, three 2x4's, and then boards on top. That is what they call a pallet board.

Q. Isn't it a customary practice to lay that type

(Testimony of Erling H. Bendiksen.)

of flooring in barges to protect against possible dampness to the cases?—that are being stowed?

A. No.

Q. You never saw that done?

A. I never saw pallet boards but they used other grating; what we refer to in Bristol Bay as grating.

Q. Grating? A. Yes.

Q. Would you describe a grating?

A. We have them on our barges, too.

Q. What is a grating?

A. A grating is something like you might call it, not like [96] pallet boards. But a grating is made out of first cross pieces and then 2x6's or 2x8's nailed on top of them, you see, into squares about, oh, they might be 6x6 or 8x8.

Q. How deep are these?

A. Oh, they would be, maybe,—

Q. (Interposing) —Six inches?

A. Four inches deep.

Q. Four inches deep.

A. Two inches and then two inches on top.

Q. How square are they?

A. Oh, they will vary in size. It depends. There will be no fixed size. They would vary from 6x6 to 4x6 and 4x8.

Q. Are they heavy?

A. Yes, reasonably heavy. I can show you some. I got some right here in Lake Union.

Q. Well, that is customary then to use those gratings in the barges?

A. It is customary, yes; but it is customary

(Testimony of Erling H. Bendiksen.)

to use planks too; I mean, that depends. So long as you protect the cargo from dampness, that is the main thing which I do.

Q. The main thing is to protect the cargo, is that it?

A. Well, it is put on there to protect the cargo. If you are referring to something else here regarding anybody [97] getting hurt; I don't think that it is our practice to hurt anybody. We hire people——

Q. (Interposing) But on this particular barge——
Mr. Merrick: He didn't finish.

Mr. Poth: Excuse me; had you finished?

A. Yes, go ahead.

Q. But on this particular barge you used this scrap lumber for flooring to protect the cargo, is that correct?

A. Well, I want to find out what you consider "scrap" lumber. I don't know how to answer that. What do you mean by "scrap" lumber?

Q. You didn't use gratings, and you didn't use pallet boards?

A. Well, what would you call "scrap" lumber? I want to know that. I don't know how to answer.

Q. You described, I believe, this lumber as being of odd lengths, two feet, three feet, and different widths, and you stated that you believed you ordered the men to cover the entire floor of the barge with lumber of that type rather than gratings which you testified you customarily used.

A. Well, grating on barges could be called

(Testimony of Erling H. Bendiksen.)

"scrap" too. It depends on what shape it is in. I mean, you can't just call something scrap. I mean you can buy "scrap" lumber planks, you know. They call scrap lumber 2x6's and 2x8's. [98]

Q. But this was not regular flooring? It was of random lengths and sizes, was it not?

A. Well, they were platforms, is what they were. Instead of being 8x8, they might have been 4x4's and 3x3's. No difference from the pallet boards. The smallest pallet board used here in the city is probably 32"x40".

Q. Didn't you testify——

A. That is the regular standard——

Q. Excuse me; had you finished?

A. Go ahead.

Q. You had testified that these were of different lengths and sizes, one inch in thickness. Is it your testimony now that some of them were three inches and four inches in thickness? A. No.

Q. They were all one inch?

A. If you are referring to some platforms I bought from St. Vincent de Paul, I couldn't tell you exactly to the inch what the sizes are, but I would say they were something like 30"x30"; maybe some of them were 30" by 24".

Q. By "platforms" do you mean one piece of lumber or something that has been constructed and built together?

A. Something that has been constructed. I think they were hardwood platforms.

Q. Would you describe these platforms? [99]

(Testimony of Erling H. Bendiksen.)

A. Well, they were nailed just the same as a grating except for they were a little smaller than the large grating. I mean, you can call them a grating as well as a platform.

Q. And you had the men scatter these all over, is that right?

A. Well, why we laid them out is to protect the salmon from dampness seeping in from the outside.

Q. How much did they weigh, these ones that you had there on July 20th?

A. Oh, these platforms would weigh probably; oh, I don't know. That would be hard to say off hand in pounds; maybe 20 pounds, maybe fifteen pounds. I really don't know what to say.

Mr. Merrick: It might clear it up. You have more barges than one. That may be the confusion; I don't know if there is a meeting of the minds as to what you are talking about. He has got a large barge and small barges.

The Court: We are thinking about the barge that was tied up in the river.

Mr. Merrick: The barge has never been identified as to where this man was injured. That is the problem.

Q. (By Mr. Poth): Well, what was the barge that Mr. Cuadra was injured on?

A. I think the barge that you are referring to here must [100] have been a barge something like 22 feet by 60 feet.

Q. 22x60? A. By 60 feet.

(Testimony of Erling H. Bendiksen.)

Q. That that have any motive power of its own?

A. No.

Q. Is that a steel barge?

A. A wooden barge.

Q. And what was the flooring of that barge made out of?

A. Oh, probably about 4x8's.

Q. Was it smooth wood? A. Yes.

Q. Easy to walk on? A. Yes.

Q. And then you ordered the men that day to cover that whole flooring of that barge with these platforms or lumber or whatever you want to call it, is that right?

A. Well, I don't know if we covered the whole thing first before we started loading. We might have covered a section of it and then filled that up and then covered some more.

Q. You don't remember?

A. No, I don't remember how that was done, whether the whole deck was covered or not.

Q. Now these regular gratings, if you step on them will they tip?—the regular gratings that you use? [101]

A. Oh, the regular grating, that would depend. Are you referring to large grating?

Q. Yes, the regular large gratings. If you step on the edge of one of them, will they tip and fly up?

A. No. If all of the boards are nailed down, they shouldn't do it.

Q. The whole grating won't tip up?

A. No. I don't see why they should.

(Testimony of Erling H. Bendiksen.)

Q. Now these little three-foot platforms that you are talking about that you may have gotten from St. Vincent de Paul and which may also have been lumber of some kind or wood of some sort of random lengths and sizes——

A. Yes.

Q. ——that were on that barge on the twentieth day of July, 1953——

A. Yes.

Q. ——could those tip up if you stepped on them the wrong way?

A. Oh, it is possible they could.

Q. Did one tip up with you that day?—and cause you to fall down?

A. I don't—like I said, I don't remember.

Q. You don't remember?

A. I know I wasn't hurt by any means, if one did.

Q. But the fact is that on that barge on that day you did [102] not have your regular heavy gratings that you used?

A. Well, what do you mean “that I used”? I mean, there is no fixed——

Q. (Interposing) That you customarily used?

A. There is no fixed ruling for what you use on the deck.

Q. Well, I believe you testified that ordinarily you used these heavy wooden gratings?

A. Well, I say they will vary in size.

Q. Yes.

A. The main thing is to protect the cargo from the deck.

(Testimony of Erling H. Bendiksen.)

Q. Yes, but that is the ordinary thing to have heavy wooden gratings? A. Well——

Q. Isn't that the ordinary thing?

A. They would——

Q. Isn't that what those heavy wooden gratings are made for?

A. Well, they make them into squares——

Q. (Continuing) ——To fit over——

A. (Continuing) ——so they can be handled off and on.

Q. Yes. A. But the size was——

Q. But those were not being used on that particular barge that Santos Cuadra was injured, were they?

A. Well, if we were using small ones, I guess we were not using big ones; that is true. [103]

Q. Now you say you bought some platforms from St. Vincent de Paul, small platforms, is that right, three or four foot square, is that right?

A. That is right, something a little smaller than a pallet board possibly.

Q. Did St. Vincent de Paul make those up especially for you or was it something they had there?

A. It was something they had there. They were not made especially.

Q. What had they originally been made for?

A. They were brand new. They had never been used. Well, they had been used for something, but——

Q. You don't know what they had been used for?

A. I don't know whether they come from a can

(Testimony of Erling H. Bendiksen.)

company or some company. They were a shipping frame, I think; steel companies, or something in the East.

Q. In other words, they weren't something that had been manufactured and made as a flooring for barges?

A. No. That is true. I don't think they were.

Q. In other words, and they also had not been fashioned and made for people to walk on, is that right?

A. Well, that would all depend. They were not made especially for that job, that is true.

Mr. Poth: I have no further questions.

Mr. Merrick: I will call Mr. Bendiksen later as part of our case. [104]

The Court: That is all. You may be excused at this time, sir.

(Witness excused.)

Mr. Poth: Oh, pardon me; one more question. Did you employ William C. Price after the season, after the return from Alaska?

Mr. Bendiksen: Well, I didn't employ him. He was still on more or less you might call it the payroll.

Mr. Poth: He worked for you. He was on your payroll and worked for you back here in Seattle?

Mr. Bendiksen: That is right. Well, he didn't work for us in Seattle. The only way, he was cleaning up some work that he did or that he was supposed to do up there.

Mr. Poth: He was on the payroll and you paid him. Didn't he work for you two months?

Mr. Bendiksen: All together, do you mean, the whole summer?

Mr. Poth: After he got back here?

Mr. Bendiksen: No.

Mr. Poth: How long did he work for you back here?

Mr. Bendiksen: Oh, he might have worked for two or three weeks maybe, I don't know.

Mr. Poth: In other words, you didn't fire him when he got back from Alaska? [105]

Mr. Bendiksen: Well, he done some work that he had information on. He was supposed to be a timekeeper and do some storekeeper work, but he was not too satisfactory. Is that all?

The Court: Are you through, Mr. Poth?

Mr. Poth: Yes, sir.

Mr. Poth: I will call Mr. Santos Cuadra at this time.

SANTOS CUADRA

a witness called in his own behalf, was first duly sworn, and then was examined and testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Santos Cuadra.

Q. And where do you live, sir?

A. 118 Fourth Avenue South in Seattle, Washington.

Q. Did you ever have any trouble with your

(Testimony of Santos Cuadra.)

knee prior to July 20, 1953? Did your knee ever hurt you?

A. Oh, last year it got hurt, banged my knee.

Q. I mean before you got it hurt in 1953, did you have any trouble with your knee?

A. No. [106]

Q. What kind of work have you been doing all of your life? A. General work.

Q. What type of work?

A. Oh, work for the painting.

Q. For who? A. Painting.

Q. Were you an agricultural worker? Did you work on the farms?

A. I work in the farm too and I work for the ship, the Army Transport; I drive a tractor and I drive a truck, and hand butcher; and any kind of job here in Seattle I work there.

Q. Have you been able to work since you got hurt in 1953?

A. Since that time there was accident I never been work. Last year I worked for two hours or two days. That is all.

Q. Why didn't you work?

A. Because the doctor just told me to look for job to exercise your knee. So I worked for two days, and then I quit because she is bothering me; my knee swelled up.

Q. Did it swell up?

A. It swelled up there at that time.

Q. Did it hurt you?

A. Sure, it hurt then.

(Testimony of Santos Cuadra.)

Q. Does your knee hurt you now? [107]

A. Sure, it hurt my knee; I cannot stand very good.

Q. Tell us what trouble you are having with your knee right now.

A. My knee is troubled, here is the operation, and back here it is now.

Q. Are you able to work now?

A. I look for a job, but I tried for two hours, for one hour and one-half again, and this bothers me; why, there is a pain in my knee all of the time. And maybe I walk; two blocks I take a rest. Maybe I sit down, and I can't take a walk right away. I have a cigarette and go and walk, you see.

Q. How much were you making a year before you got hurt? A. Oh, in 1953?

Q. No, I mean, how much did you average a year before you got hurt?

A. Oh, last year I got two days I worked; that is all.

Q. No, I mean before you got hurt?

A. I don't know how much then I got before.

Q. How much did you make in 1952?

A. I forgot how much I make then. I think I have got something in my bill, an income tax bill here; I don't know that.

Q. Was it around \$3000.00? Do you understand me?

A. I think in 1952 it was around \$3000.00. [108]

Mr. Merrick: I want to start objecting now if you are going to start leading the witness.

(Testimony of Santos Cuadra.)

Mr. Poth: I have an interpreter here that I could call up that speaks very good English, and Mr. Soriano also speaks Spanish, your Honor.

The Court: Well, we will get along without an interpreter if we can. If we can't, why, we can use one.

Q. (By Mr. Poth) I might stipulate on that to save a little time. If I could, perhaps we can stipulate that for the calendar year, 1953, he paid income tax on \$2898.95. No, that was for 1952, I am sorry. He paid it in 1953.

Mr. Merrick: May I see that a minute?

Mr. Poth: In 1953, \$1413.13. That was the year in which he was injured.

The Court: Will you stipulate that that was the Plaintiff's income for 1952, that is, from work, that is compensation paid, \$2898.95 in 1952? And compensation paid for 1953, up to what date? That was paid during the period of this time. After July?

Mr. Poth: There is no record, there are no earnings after July of that year when he was injured. Of course, I believe he was guaranteed two months' salary up there, so he got his two months' salary.

The Court: So his compensation in 1953 was \$1413.13 including two months' compensation in Alaska. [109]

Which was the whole time. May I ask, was that the amount of compensation received by others similarly employed?

Mr. Poth: Yes.

(Testimony of Santos Cuadra.)

The Court: So there is no time lost up there?

Mr. Poth: No.

Mr. Merrick: There is nothing in 1953, is there? The only employer who shows in 1953 is Queen Fisheries?

Mr. Poth: That is right.

Mr. Merrick: Two months. He didn't go to work until June of 1953.

The Court: All right. The stipulation will show.

Q. (By Mr. Poth): Now on the day that you were injured on July 20, 1953, did anybody tell you to go to work on a barge?

A. Mr. Bendiksen.

Q. Mr. Bendiksen, who is sitting in the courtroom here?

A. Mr. Bendiksen, yes. He is the boss over us.

Q. He was the boss?

A. He was the boss for the work on the barge before loading the salmon.

Q. And did you go down on the barge?

A. Everybody did go down on the barge, except the rope and everything for loading salmon.

Q. And, did he or did he not tell you to cover the deck of the barge? [110]

A. Mr. Bendiksen.

Q. Mr. Bendiksen did? A. Yes.

Q. What did he tell you to cover it with?

A. With the *fence* for the water so it don't ship the first deck of cases; it get no water at all.

Q. And what if anything did he give you to put down there? A. A canvas there.

(Testimony of Santos Cuadra.)

Q. What?

A. Put the canvas, I mean, on the floor?

Q. Yes.

A. That boards not secured and besides not square; some big and some short ones.

Q. Where did these boards come from?

A. Oh, that boards come from St. Vincent's dock over there. I know because I worked for one month over there on that Alaska Queen to paint over there, you see, before loading that boat over there.

Q. They came from St. Vincent de Paul's dock?

A. Yes, the dock over there on Union Lake.

Q. And who took them off of there?

A. Well, Mr. Bendiksen just tell the Filipino foreman in the afternoon; so everybody were loading to inside the Alaska Queen. And next day, the next morning, I come back, I heard that somebody remarked, "Why did you [111] load these boards inside of the Alaska Queen"? You see.

Q. What were these boards like?

A. Well, they look like long lengths this one and some four feet and some three feet, you see, that board over there, already inside of the Alaska Queen.

Q. Did he have you cover the whole floor of the barge with it?

A. Well, at the time in loading that salmon, the cases of salmon for the barge, at the top it is covered up because defense for the water there, you see?

(Testimony of Santos Cuadra.)

Q. Right.

A. Ship the first cases over there, or the cans.

Q. All right, did he tell you to cover the floor of the barge with them?

A. Mr. Bendiksen.

Q. Did he tell you to just cover parts or did he tell you to cover all of it?

A. (No response.)

Q. How was the walking on it?

A. Pardon me, walking?

Q. Yes, how did you walk on it?

A. On the scow?

Q. Yes. How were you able to walk? Was it good walking? A. Oh, no.

Q. Or bad? [112]

A. At the time about an hour and one-half of longshore over there, I mean, in loading the salmon, Mr. Bendiksen, I saw him just fall down on that board over there. So after that Mr. Bendiksen go up the Alaska Queen on top of the deck, you see; and everybody work loading salmon.

Q. Did you have any trouble walking?

A. Oh, well, at that time I never had no trouble yet, but the boards not secure over there.

Q. What was wrong with them?

A. They was crooked, not even.

Q. Now tell me, were any cross pieces laid first?

A. No; that board just piled up like that. The first time in loading that salmon, the cases of salmon, I put, I start to loading, I put side by side, I mean, in the corner.

(Testimony of Santos Cuadra.)

Q. Yes.

A. So Mr. Bendiksen just come down in the scow: "No, no, don't put like that. Put everything boards on, put boards in the front of the scow."

Q. All over?

A. All over, you see.

Q. Instead of doing it tier by tier?

A. Yes, that is right.

Q. He wanted you to put it all over?

A. That is right, because I don't like to hurt them—— [113]

Q. What was that?

A. But Mr. Bendiksen just come down in the scow, "Don't put the boards like that; put boards everything inside the scow around the scow."

Q. Cover everything?

A. Cover the boards in the scow everything. But I see Mr. Bendiksen just fall down after the covered wood and everything in the scow, so that time after that Mr. Bendiksen go up on the deck of the Alaska Queen, and then everybody loading salmon.

Q. All right, now. Did you get hurt that day?

A. I think after three o'clock. I come back, you know, for coffee time, and at that time I have accident.

Q. How did the accident happen? You tell us now in your own words?

A. I pick up the one case of salmon to pile up; so I throw, I missed the board to put on my knee, I mean, my foot, I missing, and, you know, this

(Testimony of Santos Cuadra.)

corner here in the middle, so I missed this one, and so I throwed that cases, that board went turned over and hit my knee here, and then I fall down.

Q. I see.

A. And then somebody help me to pick up and bring me to that side here, about ten minutes. So I saw Mr. Bendiksen over there on the deck on the Alaska Queen; about [114] ten minutes somebody help me bring me to my bed over there. After that I never, no more, because it swelled up here, my knee.

Q. Did it swell bad?

A. It swelled up bad here. I told them, the foreman, the Filipino foreman, tell to Mr. Bendiksen, "bring me to hospital because very badly on my knee." He answered to me, "Tomorrow." He said, "Santos, tomorrow; Mr. Bendiksen take you up tomorrow." Next today again "Tomorrow", but I stay in bed two night and three days. Nobody would give me coffee at that time because at that time was busy, busy work day and night, 24 hours, 36 hours' work. You see, a lot of fish. Nobody would give me coffee. That is the only one, that guy (Price) he gave me coffee; that is all, but instead my knee swell up big, about 100 pounds something like me knee, so I can work no more. But still I talked to the foreman, "Why didn't you talk to Mr. Bendiksen to take me to the hospital"? He said, "I take you tomorrow; I am busy until the season is over." They gave me a note and he asked me, he said, "Well, Mr. Cuadra, back to Seattle when the sea-

(Testimony of Santos Cuadra.)

son is through." I stay in the hospital. That is what happened to my knee. I got an operation.

All of those machinists over there, he go to my bed. [115]

Q. Now have you worked at other canneries in years past? A. Oh, yes.

Q. Before you worked for Mr. Bendiksen?

A. Well, I was working for Mr. Bishop for two years, 1952 and 1953.

Q. Who did you work for before that?

A. Oh, for Mr. Wingard's place.

Q. Wingard? A. Wingard.

Q. Where is that, Ushigak?

A. No, Ugashik.

Q. Ugashik? A. Ugashik.

Q. And who else have you worked for up there? Did you ever work for Libby?

A. No, I never. I think Libby, I don't know; I think Ugashik, at the Wingard Packing Company, before that I was working.

Q. Who else have you worked for up there?

A. Eh?

Q. How many years have you been working in Alaska?

A. Oh, at Wingard's place, about seven years, Bristol Bay.

Q. Who did you work for before that?

A. I was working for Pacific American Fisheries for nine years.

Q. You heard Mr. Bendiksen testify here? You heard him testify? [116] A. Yes.

(Testimony of Santos Cuadra.)

Q. At these other places that you worked did you see salmon being loaded in barges?

A. Yes.

Q. You did?

A. In Alaska, I mean at Wingard's, it is different in loading that salmon for Mr. Wingard's scow.

Q. Yes.

A. We have secure plywood, I mean planking, or whatever do you call that?

Q. Pallet boards?

A. Pallet boards, yes, before the boys would load that case of salmon secure.

Q. The floor was secure?

A. Secure everything, but Mr. Bendiksen's place, no. He is the boss over there; he is now. And at that time I was accident he looked at me and then he go out and he go to the warehouse, I think; I don't know. One carpenter go downstairs and they break that kind of a board over there, you see, but still I stay there in the scow.

Q. Now this little platform or whatever it was that you stepped on, what part of it was your foot on when it turned over and threw against you?

A. It hit my right knee. I throw one case to pile up, so I missed to step that board on this side so the board went [117] and hit me in my knee.

Q. Yes.

A. And then I fall down. Somebody helped me to get up and put me in the corner here. About ten minutes somebody wouldn't help me and put in the

(Testimony of Santos Cuadra.)

bed, in my bed over there, you see. And then I told him, ask Mr. Bendiksen about 5:30 in the afternoon, bring me to a hospital because my knee is swelled up here," you see. The poor Filipino foreman, he said, "I asked already to Mr. Bendiksen who will take you for tomorrow morning." Tomorrow morning no more.

Q. Maybe I didn't understand you, but did you testify, did you say you saw Mr. Bendiksen fall down himself?

A. Why, sure; I see that.

Q. I see.

A. At that time I say to Mr. Bendiksen fall down that time, too.

Q. Where was that? Was that down in the barge?

A. That was down in the barge. After that——

Q. The same thing happened to him that happened to you? A. Not the same time.

Q. But the same thing? A. No.

Q. What happened to him?

A. That board here, he mistake the, what do you call it, the [118] step of that board, so the board went a little bit of a hole there, you know?

Q. Yes.

A. And then Mr. Bendiksen just swunged like that, you see. After that Mr. Bendiksen go up on desk, Alaska Queen deck.

Q. He didn't come back down any more?

A. No, he don't come back no more.

Q. He left you down there, though?

(Testimony of Santos Cuadra.)

A. All of the time watching the boys working over there, you see.

Q. Now, did you ever go ashore when you were up there? A. No.

Q. Did you ever work ashore? A. No.

Q. Did you spend all of your time on the ship?

A. On the ship all of the time.

Q. Was the ship in the water?

A. Yes, sir.

Q. Was the barge in the water?

A. Yes, sir.

Q. All of the time?

A. All of the time.

Q. Was there water underneath it?

A. Oh, sure; yes, sir. [119]

Q. And did you eat all of your meals on the ship?

A. I ate on the ship all of the time.

Q. Did you sleep all of the time on the ship?

A. All of the time on the ship, yes.

Q. Have you done gardening and agricultural work? Do you do that? A. Last year?

Q. No, no, before you got hurt. Did you work on the farm?—agriculture—agricultural work?

A. Where, in Seattle?

Q. Farm labor? Do you do farm labor?

A. Oh, yes. In Seattle? Yes.

Q. And I mean, did you do it in California?

A. All over.

Q. All over?

(Testimony of Santos Cuadra.)

A. Yes. I got a farm here before that, in Seattle, Washington.

Q. What did you do on the farm? Did you squat down?

A. I drive tractor, drive horse and everything. I got a farm here and then White Center.

Q. Did you ever pick—work in the lettuce?

A. Pardon me?

Q. Did you work in the lettuce?

A. Lettuce, strawberries, and picking grapes, tending lettuce, and tending everything I work in because I worked as *hard* man, you know, in this country. [120]

Q. Do you have to get down close to the ground when you do that? A. Sure.

Q. Did you ever work asparagus?

A. I worked for 1929 in asparagus two years.

Q. Artichokes?

A. I get everything. I start at 2 o'clock, 1:30 in the morning cutting asparagus. Yes.

Q. Are you able to do that now?

A. No more. That is what I have been doing. Something hurt my knee.

Q. When you were on the ship did you ever clean up around the ship? A. Yes, sir.

Q. What else did you do around the ship besides butcher fish? A. Paint.

Q. Paint? A. Yes.

Q. Did he have you paint the ship?

A. Yes, sure; I paint all over. Any kind of job on the ship after the eight hour work. After eight

(Testimony of Santos Cuadra.)

hour, I take a bath on the ship, go to bed and sleep, and then come back again.

Q. Have you ever handled the lines; take up on the lines? And slacken them? [121]

A. Slack everything. The scow would bring the fish; then the boys who were working on the scow they throw the rope so I help them together.

Q. Now then, when the tide goes in and out—you know what the tide is?

A. Yes, I know that.

Q. Did they have to shift the lines from the ship to the dock; did they have to move the lines?

A. No.

Q. Take them in or let them out?

A. No.

Q. With the current?

A. No. I can't understand that.

Q. Was this a floating dock or was it on piles?

A. They got the water there.

Q. What?

A. They got the water there.

Q. Well, did you ever handle lines on the ship? Do you know what I mean?—the mooring lines that tie the ship to the dock? A. Yes.

Q. When did you do that?

A. Because I work in the ship then.

Q. You did that up there? A. What?

Q. You did that on the Alaska Queen?

A. Yes, sir.

Q. You would take them in and let them out?

A. Yes, sir.

(Testimony of Santos Cuadra.)

Q. When did you do that? When?

A. At the times when I had no accident.

Q. What was that?

A. At the time when I'm not accident.

I can't understand him.

The Court: Are you about through?

Mr. Poth: I am through, your Honor.

The Court: I think that we will recess then.

Mr. Merrick: Your Honor, what time do you want to start tomorrow?

The Court: We will recess until 9:30 o'clock tomorrow morning.

(Whereupon at 4:30 p.m., the hearing was adjourned to reconvene at 9:30 a.m., Wednesday morning, May 18, 1955.) [123]

Clerk: The case of Santos Cuadra versus Queen Fisheries, Inc., is now on for further trial.

The Court: I believe you had finished with your direct examination of Santos Cuadra.

Mr. Soriano: Yes, Mr. Cuadra is now on the witness stand for cross examination.

I wish to ask him one question, your Honor, prior to Mr. Merrick going into the cross examination.

Mr. Soriano: Mr. Cuadra, how old are you?

Mr. Cuadra: Fifty-three.

Cross Examination

By Mr. Merrick:

Q. I believe, Mr. Cuadra, you testified that you haven't worked since this accident, is that right?

A. What.

(Testimony of Santos Cuadra.)

Q. You haven't worked? A. Worked?

Q. Yes, "worked"?

A. Since that time I have the accident, no.

Q. No? You haven't been able to work?

A. I have been unable to work. I tried to work for two days.

Q. Okeh, now, when was this two days that you tried to work? [124]

A. At the seafood company, dogfood——

Q. Where?

A. At the dogfood packing house, I mean.

Q. When, when?

A. Last year because——

Q. When last year?

A. I don't know what day. In August last year.

Q. Was it before you went to see Doctor Rickett? A. What?

Q. Was it before you went to see Doctor Rickett?

A. No. I think yes; it was about then.

Q. Well, you saw him June 30 and he testified in his report yesterday that you told him that you had tried to work two days. Was it prior to June 30, of 1954?

A. Yes, because Doctor Stewart just told me to practice your knee to work it.

Q. Yes.

A. And then I worked for one day for one hour and one-half. So I come back to Dr. Stewart.

Q. But you have not been able to work since that date?

(Testimony of Santos Cuadra.)

A. Then I have been to Dr. Rickett and then I got nothing to work, I got no money so I tried to work in the shop part of that dog food for two days and I got a bad pain in my knee. I can't stand it, and until now I never work yet. [125]

Q. So you have not been able to work since that day at all outside of those two days?

A. I willing to work but I can't stand it good because it is bothering my knee.

Q. Do you know Mr. John Caughlan, a Seattle attorney? A. Who?

Q. John Caughlan?

I am asking to have this marked for identification. A. Who is John?

Q. Do you know an attorney by the name of John Caughlan?

He is representing you in another lawsuit, isn't he? A. (No response.)

Mr. Merrick: I have a file here, your Honor. It is file number 476,394 of the Superior Court of the State of Washington for King County. I am having it marked for identification. I have a certified copy of the complaint that I want to put in evidence. I have checked this file out from the Clerk's office.

Q. I would like for you to look at this file. Handing you what is the complaint and the verification attached thereto. Is that your signature?

A. Yes.

Q. And that is verified by Mr. John Caughlan—your signature? A. Yes. [126]

(Testimony of Santos Cuadra.)

Q. That is your signature, isn't it?

A. Yes.

Q. Now do you recall starting this lawsuit with Mr. Caughlan in December of 1954?

May I have this marked for identification?

(Defendant's Exhibits Nos. 1 and 2 marked for identification.)

Q. Did you ever tell Mr. Poth or Mr. Soriano that Mr. Caughlan was representing you in another lawsuit?

Clerk: Defendant's Exhibits Nos. A-1 and A-2 marked for identification.

Q. Let's get an answer to this question? Do you know Mr. Caughlan? He is an attorney down in the Lowman Building.

A. I don't know. I don't remember that.

Q. Now, you are testifying under oath; you understand that you are supposed to tell the truth when you are up here? A. Yes, I know.

Q. And you say you don't know Mr. Caughlan?

A. John Caughlan?

Q. John Caughlan, an attorney?

A. On Second Avenue?

Q. Yes.

A. Yes, I think John Caughlan; I think I know him.

Q. And he is representing you in another lawsuit against Queen Fisheries, Inc., isn't he? [127]

A. Yes, because I like to work that time, you see.

(Testimony of Santos Cuadra.)

Q. Yes. Well, he is your attorney in this other lawsuit, isn't he?

A. Of course, at that time——

Q. Now, wait a minute; he is your attorney in this other lawsuit, isn't he?

A. Yes; for a different case, yes.

Q. Yes; it is a different case but you are suing for wages; you are suing Mr. Bendiksen, aren't you?—Queen Fisheries, Inc.? A. Yes.

Q. And also, Luciano Vequilla is one of the plaintiffs in that case, isn't he? A. Yes.

Q. You never told Mr. Soriano and Mr. Poth about this case, did you? A. No, I haven't.

Q. This is the first they have known about it, this morning? A. (No response.)

Mr. Merrick: I would like to offer Defendant's Exhibit A-2 in evidence. It is a certified copy of the original complaint on file in cause number 476,-394, a cause of action in the Superior Court for the State of Washington, County of King.

Mr. Soriano: I would like to object, your Honor. I would like to know what the purpose of it is.

Mr. Merrick: Well, read the complaint. That is the—he alleges that he was available and desired to go to work. Paragraph Six of the Complaint.

Mr. Soriano: There are several different plaintiffs here.

Mr. Merrick: He verified the Complaint.

There are several plaintiffs. Your Honor, the clerk's verification is on the rear of the certified copy.

(Testimony of Santos Cuadra.)

Mr. Soriano: I take it this was after Dr. Stewart said that he should try to work, right?

Mr. Merrick: It was filed December 20 of last year, 1954.

Paragraph Six, your Honor, I think impeaches him. At least that is the purpose of offering it.

The Court: I will overrule the objection.

You have no objection to the certified copy, I assume? Your objection doesn't run to the fact that Defendant's Exhibit A-2 is a photostatic copy?

Mr. Soriano: No.

The Court: It only goes as to whether it is material or relevant?

Mr. Soriano: As to whether it is material or proper to offer it. [129]

The Court: I think that it may have some bearing on the credibility, and on that basis the court will admit it.

(Defendant's Exhibit A-2 was received in evidence.)

Q. (By Mr. Merrick): Now, Luciano Vequilla, who is also one of the Plaintiffs in this action, is the gentleman who testified yesterday, is he not?

A. Yes.

Q. The man who is in the courtroom back here?

A. Yes.

Q. Now to go to Alaska to work in the canneries you generally take a physical examination, do you not?

You are given a physical before you go up there to work?

(Testimony of Santos Cuadra.)

A. Yes. Because Doctor Stewart wanted to put me to work and back to Alaska Queen.

Q. He gave you a "return to work" slip, didn't he? A. After that—

Q. (Continuing) In May? A. Pardon me?

Q. You got a return-to-work slip from him in May, didn't you, so you could go to work in the canneries?

A. Dr. Stewart, that is why I go to the Union then but still I hurt my foot then. [130]

Q. But you were ready to go back to work in May, weren't you?—of 1954?

A. Well, the Doctor Stewart would force me so I worked one day one hour and one-half, so he bother me, so I said to Dr. Stewart I tell him I can't go back to work in the cannery because there is pain in my knee.

Q. You didn't start this present lawsuit until Mr. Bendiksen refused to hire you for last season, isn't that correct? A. Yes.

Q. The answer is "yes," isn't it? A. Yes.

Q. Now on the day that you were hurt, what time did you start to work that morning?

A. Eight o'clock in the morning.

Q. Eight o'clock. You are sure it wasn't seven o'clock? A. What?

Q. Wasn't it closer to seven o'clock?

A. At night?

Q. In the morning?

A. Well, I get up at five o'clock in the morning

(Testimony of Santos Cuadra.)

and then we start at eight o'clock in the morning again.

Q. Do you recall in your deposition testifying that you started to work at seven o'clock that morning?

A. No, I didn't start at seven o'clock in the morning, but I [131] get up at five o'clock in the morning for breakfast then.

Q. Do you recall the deposition we took in Mr. Poth's office on February 11 of this year?

A. Last year, or this year?

Q. This year? A. Yes.

Q. Now, do you recall my questioning you thusly, "Now, what time had you started that day working on this barge"?

"Answer: In the morning."

"Question: What time in the morning"?

"Answer: Seven o'clock."

Do you recall answering that way?

A. No, I don't think I did.

Q. Well, anyway, you say you started at eight. How long did you work that day?

A. Well, we started at eight o'clock in the morning until 3:15; at that time there was accident.

Q. Did you work steadily all day?

A. Yes, sir.

Q. Did you have any breaks for lunch or for coffee?

A. No; you know that. You quit until twelve o'clock and go eat. At 12:30 we come back to work again.

(Testimony of Santos Cuadra.)

Q. In other words, you had a half-hour lunch hour? A. No chance. (No change.)

Q. But you worked from eight to three with a half-hour for lunch? [132] A. Yes.

Q. Did you place these boards in the barge that you described falling over yesterday?

A. Yes.

Q. You have loaded barges before, isn't that correct?—at canneries?

A. The Alaska Queen?

Q. No. Now when you worked for Wingard up there you loaded barges with canned salmon, didn't you? A. Yes, sir.

Q. You worked for Wingard for seven years?

A. For seven years, yes.

Q. Now this dunnage that you tripped over or fell over, you put some of that in the barge yourself, didn't you? A. (No response.)

Q. Did you spread it around the floor?

A. Well, everybody then.

Q. Yes.

A. Even Mr. Bendiksen, because he is the boss over there in the barge; he put the boards, you know, the boards not even.

Q. You say it was like that all day when you worked there?

A. Well, at the time there was accident at 3:15 I never came back to work because my knee swell up right away in the afternoon. [133]

Q. But you worked all day under those condi-

(Testimony of Santos Cuadra.)

tions from eight to three o'clock with a half hour off for lunch? A. Yes.

Q. And you say you saw Mr. Bendiksen trip over one of these boards?

A. He just fell down; yes, I saw him there.

Q. That was before you were hurt?

A. Yes.

Q. Was he hurt? A. Mr. Bendiksen?

Q. Yes. A. I don't know.

Q. Have you ever hurt your knee before?

A. No.

Q. Have you hurt it since? A. No, never.

Q. Have you hurt it since?

A. At the time of the accident?

Q. Yes.

A. Sure, I fell down and got hurt.

Q. No. Have you injured it again since the original accident up in Bristol Bay?

A. No, I never been to an accident in Bristol Bay.

Mr. Merrick: Do you have the income tax forms?

Q. (By Mr. Merrick): Now, in 1953 you had an income of \$1413.13, [134] is that correct?

A. That is right.

Q. And the only employer you worked for was Queen Fisheries, Inc.? A. Yes.

Q. That was the year that you were hurt? In other words, you didn't work in the winter or spring of 1953?

A. Because I start to work in the Alaska Queen April 15.

(Testimony of Santos Cuadra.)

Q. Yes.

A. Paint deck and paint everything and scrub the floors before I go up to Alaska then.

Q. Well, in January, February, March, and the first 15 days of April, 1953, you didn't work?

A. No.

Q. You were around Seattle here, but you were just taking off? A. Yes.

Q. Usually would you lay off all winter when you worked in the canneries?

A. No. In 1952, 1951-52, I was working for the New Washington Hotel.

Q. I see. Well, if you had a good summer in Alaska, though, you would take all of the winter off, wouldn't you?

A. Oh, I got to work for the farm down Bristol Bay, I mean Winslow growing strawberries there.

Q. Well, you didn't work in any farm labor in 1952, did you?

A. I worked for two months then.

Q. Who did you work for in 1952 doing farm labor? Who?

A. Oh, Mr. Meyer's place for hoeing strawberries.

Q. Did you make any money working there?

A. Well, that is what I done for a living.

Q. You didn't report that in your income tax, though?

A. No, we didn't because one week, three days, two days' work in, you see.

Q. You don't bother to put that down?

(Testimony of Santos Cuadra.)

A. Well——

Q. In other words, in 1952 the people you worked for are Strand Fisheries. How long did you work for them?

A. Eleven days.

Q. In 1952?

A. Eleven days. About 11 days.

Q. Eleven days. And Queen Fisheries, Inc.; how long did you work for them?—in 1952?—two months?

A. Two months, yes.

Q. And the New Washington Hotel, how long did you work for them?

A. Nine months, I think; nine months.

Q. And the New England Fish Company, how long did you work for them?

A. About one month.

Q. Yes. [136]

And the Washington Fish and Oyster Company, how long did you work for them?

A. About——

Q. (Interposing) One month?

A. (Continuing) ——I don't know; three weeks or something like that.

Q. And that is a little bit more than twelve months. How long did you—are you certain you worked nine months for the New Washington Hotel?

A. Nine months, yes.

Q. Yes. Now actually when you were injured up there in 1953, you didn't lose any wages, did you?

A. No.

Q. You were paid the guarantee?

(Testimony of Santos Cuadra.)

A. Yes, I was paid the guarantee. Those people guaranteed me that.

Q. And then when you got back here to Seattle you were on Alaska Workmen's Compensation, weren't you? A. Yes.

Q. And they paid you sixty-five per cent of your weekly pay at the New Washington Hotel, didn't they? A. Yes.

Mr. Merrick: May we have these marked for identification?

Clerk: Defendant's Exhibit A-3 marked for identification. [137]

(Whereupon, Defendant's Exhibit No. A-3 was marked for identification.)

Q. And you didn't have to pay any income tax on this money that you got from the Alaska Workmen's Compensation Act, did you? A. Yes.

Q. You paid no income tax on that?

A. Yes.

Q. You say you did? A. Yes.

Q. You didn't report it?

A. Eh? Oh, that one?

Q. Yes. You didn't pay any income tax on this?

Showing you Defendant's Exhibit No. A-3 for identification, will you look at those cancelled checks, and can you identify them?

A. Yes, that is my checks.

Q. Is your signature on each one of those?

A. Yes.

Q. Seventeen checks in all. Those are your signatures on all of those checks, is that right?

(Testimony of Santos Cuadra.)

A. Yes.

Q. And those checks total \$1,237.52. Now, that is the money that you received under the Alaska Workmen's Compensation Act, is that right? [137a]

A. Yes.

Q. And they paid you that money up through March of 1954, isn't that correct? A. Yes.

Q. When Dr. Stewart said that you were able to go back to work? A. Yes.

Q. And then you were cut off?

A. No. I still, Dr. Stewart take care of my knee.

Q. Well, he told you that you were ready to go back to work late in March, didn't he?

A. Well, he told me that I work; yes, I told you yesterday and I work for one hour and one-half there and then I come back to Dr. Stewart.

Q. I see.

A. Because it just swelled up my knee.

Q. Well, after you got through here with the Alaska Act you tried to file a claim under the Longshoremen's Act, didn't you? A. No.

Q. You didn't go down to 905 Second Avenue Building and file a claim with the Longshoremen & Harbor Workers—— A. No.

Q. Department? A. No. [138]

Q. You have no recollection of ever being down there? A. No.

Q. Now when you were working up there in the cannery deck you worked under a Filipino cannery foreman, didn't you? A. (No response.)

(Testimony of Santos Cuadra.)

Q. Didn't they have a boss for the Filipino boys? A. When, last year?

Q. All of the time?

A. Oh, there is a Filipino foreman, like Wingard's——

Q. The same as Wingard? A. Yes.

Q. It is just like any other cannery?

A. No, Wingard's not my boss. There was a Filipino foreman there.

Q. What was that?

A. At Wingard's cannery there is a Filipino foreman. His name is——

Q. Yes.

A. Because Wingard, he go out all of the time.

Q. Well, there is a Filipino cannery foreman on the Alaska Queen, don't they? A. Yes.

Q. He directs you in your work? A. Yes.

Q. The same as you do at Wingard or at any other cannery? A. Yes. [139]

Q. Now, how did you get your job with Mr. Bendiksen? A. The Union did.

Q. Yes. And what Union is that?

A. American Federation of Labor.

Q. And you were dispatched out of the Cannery Workers Union to go to work in the cannery for Bendiksen, is that right? A. That is right.

Q. And you were paid under the Cannery Workers contract? A. Yes.

Q. And under the cannery workers contract you get a two-months' guarantee, isn't that right?

A. That is right.

(Testimony of Santos Cuadra.)

Q. That is the contract that the union has with the Alaska Salmon Industry, isn't it?

A. Yes.

Q. And you are familiar with that contract, aren't you? A. What?

Q. You are familiar with the terms of that labor contract, aren't you? A. Yes.

Q. You have worked up there for several years under the same contract?

A. The same contract, yes.

Q. Now the medical and hospital bills that have been incurred [140] as a result of this accident, you haven't paid any of those, have you?

A. (No response.)

Q. You have expended no money for medical or hospital bills arising out of this case?

A. No.

Mr. Merrick: I want to offer Defendant's Exhibit No. A-3 in evidence.

Mr. Soriano: No objection.

The Court: Defendant's Exhibit No. A-3 may be admitted.

(Defendant's Exhibit No. A-3 received in evidence.)

Mr. Merrick: Defendant's Exhibit No. A-2 is in, your Honor.

Q. Actually the first time that Mr. Poth or Mr. Soriano knew about this lawsuit was this morning, wasn't it? A. (No response.)

Q. You never told them about it? A. No.

Q. The answer is "no," isn't it? A. Yes.

(Testimony of Santos Cuadra.)

The Court: He said "no" before.

Mr. Merrick: That is all. [141]

Redirect Examination

By Mr. Poth:

Q. How did you happen to bring this lawsuit?
Did anyone send you to Mr. Caughlan?

A. (No response.)

Q. Did anyone have you go to Mr. Caughlan's office?
A. Yes.

Q. Who was that?

A. That is the attorney.

Q. Who? A. John Caughlan.

Q. Who had you go to Mr. Caughlan's office?

A. Me and Vequilla.

Q. Who told you to go, if anyone?

A. The business agent for the American Federation of Labor.

Q. The business agent? A. Yes.

Q. What is his name?

A. I forget the name of the business agent because at that time there was accident and I never go to the Union no more.

Q. Is he a Filipino? A. Yes, sir.

Q. Did he tell you to go?

A. Yes, because he had for somebody else.

Q. Can you read? A. (No response.)

Q. Can you read English?

A. Oh, a little bit. I can't understand it good.

Q. Can you read it?

A. Yes, but I can't understand very good.

(Testimony of Santos Cuadra.)

Q. Did you ever read this complaint before?—that you signed? Did you ever read what you signed?

A. No. I signed, but I can't read. I can't understand.

Q. Starting right here can you read that paragraph where it says "Three" there; can you read that? What does it say?

A. I can't read that.

Q. What does this say here?

A. Yes, that is my name. That is my name.

Q. What is after your name?

A. Santos E. Cuadra.

Q. What is after that? What does that say?

A. No, I can't—I can read my name, but I can't read that, that one there.

Q. You say the Union told you fellows to go to Mr. Caughlan's office? A. Yes.

A. Oh, I know already that Mr. Bryan is the business agent there.

Q. He told you to go? A. Yes. [143]

Q. He told you to go?

A. Yes. So we got three people to go to John Caughlan there, the attorney.

Q. Were there papers there? A. What?

Q. When did you sign the papers, when you went to the office?

A. Yes. I went to the office, three of them.

Q. Who told you to sign?

A. That secretary over there; "you sign your name here."

(Testimony of Santos Cuadra.)

Q. The secretary said, "You sign your name?"

A. Yes, sir.

Mr. Poth: I have no further questions.

Recross Examination

By Mr. Merrick:

Q. How long have you worked in the canneries in Alaska? A. Since 1924.

Q. You have worked continuously?

The Court: 1924?

The Witness: 1924 the first time.

Q. When did you come from the Philippines?

A. In 1923.

Q. And how long have you worked under a union contract up there? A. Since 1933.

Q. Did you used to belong to Local 7?

A. Well, 1943 I belong to Local 7.

Q. You knew John Caughlan while he was attorney for Local 7, didn't you?

A. And then I quit for five or seven years; I don't know.

Q. You knew Mr. Caughlan when he was attorney for Local 7, didn't you—he and Mr. Hatten?

A. Well, some—that business agent just told me there was a good lawyer there. I don't know.

Q. Well, you wanted to sue Mr. Bendiksen for these wages, didn't you?

A. Well, the business agent just told me to go to Mr. Caughlan there because Bendiksen hired somebody else——

Q. Yes.

(Testimony of Santos Cuadra.)

A. (Continuing) —to go to Alaska last year because I received that letter from Mr. Bendiksen in 1953, in November that Mr. Bendiksen is not opening that cannery this year, last year.

Q. Yes. And you knew under the contract that you were entitled to preference, weren't you?

A. (No response.)

Q. Under the contract boys who worked in 1953 were supposed to go out first in 1954, isn't that right?

A. Yes, sir. That is right, yes.

Q. And you knew that? A. Yes. [145]

Q. And that is why you went to see Mr. Caughlan because you felt you should have gone out ahead of these other boys?

A. Yes. Mr. Bryan, the business agent, want to send me over there, you see.

Q. That has been in the contract for years, hasn't it? A. Yes; that is right.

Q. And you know all about those contracts?

A. Yes, that is right.

Mr. Merrick: I have no further questions.

Mr. Poth: That is all.

The Court: That is all. You may be excused.

(Witness excused.)

Mr. Soriano: The Plaintiff rests, your Honor.

Mr. Merrick: Your Honor, could I have a short recess to call Mr. Bendiksen. He is the only witness I have. His testimony is going to be short. He is the only witness we have. Our case is practically in now.

Mr. Poth: If your Honor please, if it would save time we could stipulate as to the amount of the medical payments and as to the amount of compensation and stipulate that the carrier who paid those sums is subrogated in this action for the recovery of those amounts.

Mr. Merrick: Well, I am willing to stipulate on that, but I wanted to get a little testimony in from him [146] on one aspect of the operation.

The Court: We will take a short recess, but we can't wait very long. The court will take a ten-minute recess.

(Short recess.)

Mr. Merrick: I will call Mr. Cuadra as an adverse witness.

SANTOS CUADRA

a witness called by the defendant as an adverse witness, previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Merrick:

Q. Mr. Cuadra, you worked on the Alaska Queen two years, did you not? A. Yes, sir.

Q. And to run that cannery they have to tie up alongside of the beach, do they not? A. Yes.

Q. In other words, it has to be tied up to the shore? It can't run without the water from the shore, isn't that correct? A. Yes.

Q. In other words, you have to pipe the water over from the [147] beach onto the floating cannery to make it work? A. No.

(Testimony of Santos Cuadra.)

Q. Well, you get your water from the beach to run this cannery, don't you? A. Oh, yes.

Q. There is no water plant aboard that floating cannery? A. No.

Q. And you need this water to run the cannery, isn't that correct?

A. The water, they got plenty water on the Alaska Queen, you know.

Q. No, but I mean you had to get fresh water from the beach to run the cannery, isn't that right?

A. Yes, sir.

Q. And you pipe it over from the beach onto the ship? A. Yes.

Q. Now what is this warehouse up there used for? A. (No response.)

Q. Do the cans that come out of the retort after they are cooled, they are taken into the warehouse, I mean before they are cooled they are taken into the warehouse, aren't they? A. Yes.

Q. And then taken in there so they can cool?

A. Yes. [148]

Q. There are no facilities on board to cool the cans, are there, when you are canning?

A. No.

Q. Also, all of the casing of the canned salmon is done in the warehouse, isn't it?

A. Yes, sir.

Q. That is done by the natives?

A. I don't understand.

Q. Well, the sticking of the cans in the cases,

(Testimony of Santos Cuadra.)

that is done by the natives in the warehouse, isn't it?

A. No.

Q. Who does that? Do the boys do that?

A. Oh, the native boys do it.

Q. Yes, the natives do that. All right.

And the salmon after it is cooled in the warehouse and put in the boxes in the warehouse, it is stacked in the warehouse, isn't it; it is stored there?

A. Yes, sir.

Q. And then when you get ready to take it out to send it back to Seattle they bring it out of the warehouse and load it into these barges?

A. Yes, sir.

Q. Do you know how many cases of salmon they canned up there in 1953?

A. I don't; I don't know that time because there were a lot [149] of fish; day and night work, and overtime.

Q. Could it be approximately 40,000 cases?

A. I think it is more than that.

Q. Anyway, there is no place on board to store this salmon, is there? It has to be stored in the warehouse?

A. The warehouse, I think it is a warehouse for the cases over there, so they load all of the time the salmon for the scow, you see.

Q. Well, after the salmon is canned on board the Queen, it is taken and stored in the warehouse, isn't it?

(Testimony of Santos Cuadra.)

A. Some salmon is piled for the Alaska Queen because the warehouse full house; all full house that warehouse, they got no place to put the cases of salmon so put the Alaska Queen in a pile.

Q. Now they have a separate crew to bring up the Alaska Queen, do they not? A. What?

Q. A separate crew brings up the ship from Seattle? A. Yes.

Q. They have a master, right? A. Yes.

Q. Deck hands? A. Yes.

Q. An engineer? A. Yes. [150]

Q. And a cook? A. A cook, too.

Q. Those people are hired out of different unions than the Cannery Workers Union, aren't they? A. I don't think so. I don't know.

Q. Well, they are not out of the Cannery Workers Union? A. Yes.

Q. They don't work on a season's guarantee, do they? A. Oh, those deckhands?

Q. Yes. A. I don't know.

Mr. Merrick: That is all.

For the record I would like to show that Mr. Bendiksen is not here, and it is now 10:40 o'clock a.m., and that Court convened at 9:30 o'clock, a.m.

And also for the record I would like to show that court convened at 2 p.m. yesterday and Mr. Bendiksen did not appear until ten minutes to three o'clock, p.m.

Mr. Merrick: I will call Mr. Bendiksen now.

Will you take the witness stand?

ERLING H. BENDIKSEN

a witness called for the defendant, and in his own behalf, was previously sworn, and he testified as follows: [151]

The Court: I think that you have been sworn before, haven't you?

Mr. Bendiksen: Yes, sir.

Direct Examination

By Mr. Merrick:

Q. You are the same Mr. Bendiksen who testified yesterday? A. Yes, sir.

Q. What is your position with Queen Fisheries, Inc.?

A. Do you mean the management, do you mean?

Q. Yes.

A. Well, I am pretty much the manager or the superintendent.

Q. What business do you engage in with Queen Fisheries, Inc.? A. Salmon canning.

Q. All right now how long have you been engaged in that business?

A. Oh, about five or six years.

Q. Now, I believe you testified yesterday that the Alaska Queen is a boat of approximately 297 tons? A. That is right.

Q. And what is it used for?

A. Well, for—it is used for, well, for canning pretty much.

Q. All right now, where do you conduct your canning operations? A. In Bristol Bay.

(Testimony of Erling H. Bendiksen.)

Q. And how long is a season in Bristol Bay, the canning season? [152]

A. Oh, it is about a month as a rule.

Q. Generally about a month?

A. Generally, yes.

Q. Now during the period when you are not canning salmon where is the Alaska Queen moored?

A. Oh, it is moored in Seattle as a rule.

Q. How do you get it up to Bristol Bay and back?

A. By power.

Q. Do you have a regular crew to bring it up?

A. Yes.

Q. Who is in that crew?

A. How many men, do you mean?

Q. Yes.

A. Just about two engineers, three deckhands, a skipper and a mate, and the cook.

Q. And a cook? Now do you have a separate crew for your cannery operation?

A. Yes, we have a separate crew.

Q. Where do you obtain these employees for the cannery?

A. Oh, some of them are hired in Seattle and some of them are hired in the Bristol Bay area.

Q. Now the people hired in Seattle, are they generally Filipino boys?

A. Yes, those I have hired. Now I am talking about the common laborers. [153]

Q. And the people that you hire in the Bristol Bay area are they generally native Alaskans?

A. Yes.

(Testimony of Erling H. Bendiksen.)

Q. And are they generally referred to as "resident cannery workers"?

A. Yes, that is right.

Q. And the Filipino boys that come up from Seattle, are they referred to as non-residents?

A. Well, they are at this time, at the present time.

Q. In other words, there is a separate Union contract for each group?

A. Yes, there is a separate contract.

Q. Now the Filipino boys that come up from Seattle, how are they paid up there when working in a cannery operation?

A. Well, they are paid—first of all they get a two months' guarantee.

Q. They get two months whether they only work one month or four or five weeks?

A. That is right.

Q. All right.

A. And then they get overtime after so many hours.

Q. Yes.

A. And also they get overtime for any special work, like longshoring which they get at this time when this [154] accident occurred. It is covered in their agreement if any longshore work is done, then it is special work.

Q. Now how is your crew on the vessel paid, the group that brings the vessel up to the fishing grounds and back? How are they paid?

A. Oh, they are paid by the month, and also

(Testimony of Erling H. Bendiksen.)

they are under a different agreement which gives them a percentage of the pack. What I mean, they get so much a thousand cases. Like you might say, some of them would come in a scale of \$20 a thousand and others maybe \$40 a thousand.

Q. In other words, they share in the profits?

A. Well, it wouldn't be exactly profit. It could be a loss and still they would get so much a case. That is the way their scale is set up.

Q. But the amount they are paid depends on the size of your pack?

A. On the size of the pack, you see.

Q. Now is there separate supervision for the cannery crew, for the Filipino boys?

A. Separate——

Q. (Interposing) Supervision?

A. Yes, as a rule we have separate supervision.

Q. And is there separate supervision for the crew that sails the vessel? A. Oh, yes. [155]

Q. Now aboard the Alaska Queen do you have separate living quarters for the Filipino boys?

A. Yes, we have one room we use for that.

Q. Are there any facilities up there to eat ashore? A. No.

Q. Now regarding this barge where the accident allegedly occurred, how many barges do you have?

A. Oh, we have one barge of this type they are referring to here of the accident.

Q. And what is the approximate size of that barge?

A. It is about 22 feet by 60 feet.

(Testimony of Erling H. Bendiksen.)

The Court: How many barges, did you say?

The Witness: Oh, we have other barges, power barges. We have one barge that is 86 feet by 24 feet that goes up from Seattle.

Q. What other barges do you have?

A. Oh, we also have other tenders.

Q. Well, how many all together?

A. Oh, we have two others we carry fish on.

Q. Well, this particular barge, that has no power on it, I gather?

A. That is right.

Q. Is it steel or wood constructed?

A. It is wood constructed.

Q. And what is it used for primarily? [156]

A. Well, it is used mainly for receiving fish and handling salmon cases.

Q. Yes. Now when it is moved, who moves it, referring to this barge?

A. Are you referring to the towing it or——

Q. Yes.

A. It would be the tenders.

Q. Do the Filipino boys take any part in moving it?

A. No.

Q. Now, regarding your cannery up there, when it operates is it always tied up to the beach?

A. Yes.

Q. And why is that?

A. Well, we are set up such that we have to be tied up to shore for water and also for casing the salmon and cooling and storing.

Q. What do you use water for aboard this cannery?

(Testimony of Erling H. Bendiksen.)

A. Oh, we use water for the boilers and for washing the fish, and so forth.

Q. And how do you get your water from the beach; is it piped?

A. It is piped in from a lake nearby.

Q. Now, this, do you have facilities aboard to store all of the salmon that is canned?

A. No.

Q. And where is that stored? [156a]

A. It is stored ashore.

Q. Now what is the warehouse used for?

A. Well, it is used for casing and storing the salmon.

Q. Would you explain what you mean by "casing"?

A. Well, I mean by casing is you take cans out of the coolers or trays or baskets that you cook them in and put them in the boxes, shipping containers.

Q. Yes. A. That is what I mean by that.

Q. In other words, you have to tie up there to operate the cannery? A. That is right.

Q. Now, regarding this dunnage for flooring or platforms which was referred to yesterday, is that a standard type of dunnage that you use?

A. (No response.)

Q. Is there any standard type of dunnage?

A. Oh, well, I wouldn't say there is any standard type of dunnage, on any ships or barges. I have seen dunnage used by other companies. It is varied in sizes.

(Testimony of Erling H. Bendiksen.)

Q. Well, do you use pallets in this type of barge?

A. Referring to pallets you could check in Seattle here and find all different sizes of pallets and it will be the same in this grating that we are talking about here.

Q. Well, could you use pallets on this type of barge? [157]

A. Well, pallets, we are talking about pallets, the only time I have heard of pallets is where you are stacking something.

Q. In other words where you use a lift truck?

A. For lift trucks, that is right.

Q. There are no lift trucks up here in Bristol Bay?

A. Well, we use lift trucks; we use pallet boards. We have pallet boards too, but pallet boards are not used for gratings, as a rule. They are not practical for gratings because the pallet boards are not tightly boarded up. There is a space between each board.

Q. Do any of the canneries nail this dunnage to a floor of a wooden barge? A. No.

Q. Why not?

A. It cannot be done because they all use the barges for fish and they can't use any grating on them when you handle fish because they have got to be washed down clean; so there is no grating on the barges at the time of receiving fish.

Q. Do you have any recollection of Mr. Cuadra being injured up there? A. (No response.)

(Testimony of Erling H. Bendiksen.)

Q. There is some testimony here yesterday that you saw it. Do you recall? [158]

A. Oh, I expect I probably did. Sometime you know a fellow would fall down, and it wouldn't be anything serious, you know. And like he mentioned yesterday that I fell down, I don't even remember that because I might have stumbled on something and thought nothing of it. That is probably common by many of those places, you know, you do a lot of work in a short time.

Q. Is there any interchange between the cannery crew and the crew that brings the vessel up and back? In other words, do they perform or, for example, do any of the cannery boys do any work in the engineering department?

A. Referring to main engines and propulsion?

Q. Yes. A. No.

Q. In other words, they stay strictly in the canning operation?

A. Yes. I would say, I heard it referred to, some painting. The Filipinos are, some—they wash—their job is to wash down the canneries, and there has been time when they have done a little painting, something like they do in other shore canneries; they do a little painting in shore canneries as well.

Q. In other words, their work is confined primarily to the cannery, and to the cannery deck?

A. To the cannery part of it, yes. [159]

Q. Are these cannery employees ever aboard when the vessel gets under way?

A. Not in our operation up there, they aren't.

(Testimony of Erling H. Bendiksen.)

Q. How do you bring them up?

A. We bring them up by plane.

Q. And how do you bring them back?

A. By plane.

Mr. Merrick: That is all that I have.

Cross Examination

By Mr. Poth:

Q. Is it more economical to bring them up by plane and back by plane rather than to have them sail up on the ship?

A. Oh, it probably is, I would say, but they are treated just like all of the other cannery workers in the Bay that works in the store stations.

Mr. Poth: I have no further questions.

The Court: Mr. Bendiksen, are all your cannery workers covered by industrial insurance?

The Witness: Yes, under the Alaska Act.

The Court: Under the Alaska Act. How do you operate under that law up there?

The Witness: Well, we report to the insurance; we have insurance that covers it.

The Court: Do you have an insurance carrier?

The Witness: Yes. [160]

The Court: All of your cannery workers were under that?

The Witness: Under that, yes; that is right.

The Court: Under that protection?

The Witness: That is right.

The Court: In other words, you have covered all

(Testimony of Erling H. Bendiksen.)

of these cannery workers under the Industrial Insurance Law of Alaska?

The Witness: Yes.

Mr. Merrick: We have a report. Will you please mark this for identification?

Clerk: Defendant's Exhibit No. A-4 is marked for identification.

(Defendant's Exhibit No. A-4 marked for identification.)

The Court: Are your deck crew on the Alaska Queen covered by the same?

The Witness: The deck crew are covered a little differently.

The Court: Differently?

The Witness: Because they come under the sailing, you know, of the ship, so it is a different report.

Q. (By Mr. Merrick): Handing you what has been marked for identification as Defendant's Exhibit No. A-4 for identification, can you identify the signature of Mr. Boone thereon? [161]

A. Yes. I can identify that.

Q. Who is Mr. Boone?

A. Oh, he was the bookkeeper for me last year.

The Court: The bookkeeper for whom?

Witness: For us.

Q. For us? What was Mr. Price's job—the storekeeper?

A. Oh, Price was hired for sort of extra help as storekeeper and timekeeper.

Mr. Merrick: I would like to offer this in evidence. It is a report of the claim.

(Testimony of Erling H. Bendiksen.)

Mr. Poth: I will object to it on the ground of irrelevancy, your Honor.

Mr. Merrick: It is a report of the accident under the Act.

I have no objection to it going in, your Honor. As to the matter of relevancy, I think that it is for the Court to determine that anyway. Counsel apparently has no objection to its authenticity.

The Court: The court will overrule the objection.

Mr. Merrick: I have no further questions.

(Defendant's Exhibit No. A-4 admitted in evidence.)

Cross Examination—(Continued)

By Mr. Poth:

Q. Now this crew that sailed the ship up, including the [162] engineer, were they under the Alaska Act?

A. Are you referring to the insurance now?—or the Agreement, the Working Agreement?

Q. I am referring to the insurance. Were they under the Alaska Act?

A. Well, they are under whatever they come in there. We have so many of those different ways of covering that that I have to look it up. I couldn't say this minute just how that is covered. We have a policy to cover all that, and it is just too much details involved.

Q. In other words, you have a general policy that covers you for any kind of compensation, lawsuit, or liability, is that right?

(Testimony of Erling H. Bendiksen.)

A. Yes, to cover all of the different jobs, you see.

Q. And you let the insurance company decide where the proper coverage belongs where there is an injury, is that right?

A. Well, they cover it this way before we would sail; we cover the skipper and the crew on the boat come under one policy we might say and the cannery workers come under something else. We are covered on the same basis as the other companies.

Q. But you let your insurance company decide?

A. No, we have to protect ourselves. I don't buy insurance because they think we should have it. I have to buy [163] it to protect myself.

Q. So you have the men that sail the ship under one kind of insurance and you have the cannery workers under a different kind, is that right?

A. Well, I have it like I say, I have to really check up on that. It is too much involved to explain to you without having some of the things in front of me.

Q. In other words, you pay your premiums, you know that, is that right?

A. Oh, yes, we pay our premiums and we also have full coverage, the same as all of the other companies operate. That is all that I can say.

Q. And that full coverage covers you no matter what Act the men might come under when they are injured?

A. Well, that is right; like we have a carpenter. He is covered under whatever policy it takes to cover a carpenter.

(Testimony of Erling H. Bendiksen.)

Mr. Poth: I have no further questions.

Mr. Merrick: That is all unless the Court has some questions.

The Court: Do you wish to argue the matter now?

Mr. Merrick: Yes, your Honor.

(Argument by counsel; Mr. Soriano making the opening argument.) [164]

[Endorsed]: Filed November 23, 1955.

[Endorsed]: No. 14969. United States Court of Appeals for the Ninth Circuit. Santos Cuadra, Appellant, vs. Queen Fisheries, Inc., a corporation, and E. H. Bendiksen, doing business as E. H. Bendiksen Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: December 7, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14969

SANTOS CUADRA, Plaintiff-Appellant,

VS.

QUEEN FISHERIES, INC, a corporation; et al.,
Defendant-Respondents.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes now the plaintiff-appellant herein and pursuant to Rule 17 (6), and hereby adopts the Statement of Points relied on upon appeal and the Designation of Record on Appeal appearing in the typewritten transcript of record received from the Clerk of the District Court in the above entitled cause.

Dated this 5th day of December, 1955.

ZABEL & POTH,
/s/ By OSCAR A. ZABEL,
Attorneys for Plaintiff-
Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 8, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

SANTOS QUADRA, *Appellant*,

vs.

QUEEN FISHERIES, INC., a corporation, and E. H.
BENDIKSEN, doing business as E. H. BENDIKSEN Co.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

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THE ARGUS PRESS, SEATTLE

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United States Court of Appeals
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United States Court of Appeals For the Ninth Circuit

SANTOS QUADRA,	<i>Appellant,</i>	} No. 14969
vs.		
QUEEN FISHERIES, INC., a corporation, and		
E. H. BENDIKSEN, doing business as E. H. BENDIKSEN Co.,	<i>Appellees.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

STATEMENT OF JURISDICTION

This cause comes before this Honorable Court upon dismissal of plaintiff's complaint after a hearing upon the merits. The complaint was filed on the civil side in United States District Court for the Western District of Washington, Northern Division.

The case was heard by the Honorable William J. Lindberg, a Judge of the United States District Court for the Western District of Washington. Appellant has duly prosecuted his appeal to this Court from the judgment of dismissal.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 46 U.S.C.A., Sec. 688.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28 U.S.C.A., Sec. 1291, which gives to the courts of appeal jurisdiction of all appeals from final decrees of district courts.

STATEMENT OF THE CASE

The ALASKA QUEEN is a self-propelled vessel of 297 net tons. She is powered as a twin-screw diesel. Three cargo holds, a weather deck, 'tween deck, and crew's quarters generally comprise the divisions inside her hull. A part of her hold space is taken up with cannery machinery. The rest of the hold space is used for transporting cargoes of canned salmon from Alaska to Seattle (R. 101-102, 103-104).

The vessel sailed from Seattle, Washington, to engage in the fishery trade for the 1953 fishing season. The purpose of the voyage was to catch fish and preserve them by use of the canning equipment carried aboard her. On the voyage north the ship was manned and operated by a master and crew consisting of a mate, two engineers, three deck hands, and a cook (R. 158).

The ALASKA QUEEN upon her arrival in Alaska was moored in navigable waters where she remained, fully manned and provisioned, while she engaged in the fishery trade which was the main purpose of her voyage (R. 103). In order to effectuate the objects of the voyage it became necessary to supplement the ship's personnel.

The plaintiff, Santo Quadra, was flown by air to Alaska where he joined the vessel for the fishing season. He lived in quarters provided for him aboard the ship and ate all his meals there. His duties were varied and all of them were directed towards the assistance of the ship in accomplishing the purposes of her voyage.

His duties consisted of cleaning the ship (R. 79), painting her hull and superstructure (R. 131); han-

dling her lines (R. 132), working her cargo (R. 34), and generally performing an ordinary seaman's duties about the vessel. In addition he butchered the fish that were brought aboard the vessel (R. 131).

On the day of his injury the appellant was ordered to go over the side of the ALASKA QUEEN and stow cases of salmon aboard a scow moored in navigable waters alongside her. While so engaged he sustained the injuries complained of.

Appellant contends that he is a seaman within the protection of the Jones Act, 46 U.S.C.A., Sec. 688. However, the court below made its conclusion of law as follows (R. 18) ::

“That the plaintiff herein is not a seaman or a member of the crew within the meaning of the Jones Act, but is an industrial worker and that his claim comes within the jurisdiction of the Alaska Workmen's Compensation Act, Section 43-3-1 of the Alaska Code of 1949.”

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON

The appellant relies upon assignments of error contained in the Statement of Points Nos. 1, 2, 3 (R. 23).

SUMMARY OF ARGUMENT

All members of a ship's company are entitled to the same statutory protection. No distinction should be made between persons aboard primarily to “hand, reef, and steer,” and others, who occupy a more menial status but nevertheless live aboard the ship and direct their efforts to its service and the accomplishment of the main purpose of the voyage.

ARGUMENT

Appellant directs this argument to all the assignments of error relied upon, which are as follows:

1. That the court committed reversible error in its entry of Findings of Fact, Conclusions of Law, and Judgment of Dismissal with prejudice of plaintiff's complaint;

2. The court committed reversible error in not entering the judgment in favor of plaintiff-appellant against the defendant-respondents as prayed for by plaintiff's complaint;

3. That the trial court committed reversible error in entering a Conclusion of Law that the plaintiff herein is not a seaman or a member of the crew within the meaning of the Jones Act, but is an industrial worker and comes within the jurisdiction of the Alaska Workmen's Compensation Act.

1. The appellant was aboard a vessel in navigation.

The record clearly shows that at all times that the appellant lived and worked aboard her, the ALASKA QUEEN was moored and operated in navigable waters. She was a ship in commission capable of being propelled under her own power and she was manned by a captain and crew. Furthermore, she was at all times engaged in the fishing trade—a strictly maritime pursuit. In view of the above facts the ALASKA QUEEN was plainly a vessel in navigation to the extent that persons employed aboard her and in her service were entitled to be classified as seamen. *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931; *The Showboat*, 47 F.2d 286.

Her voyage was from Seattle, Washington, to Alaska and back. The purpose of the voyage was to procure fish. In this the ALASKA QUEEN did not differ in aim and principle from any other fishing vessel. Point has been made in describing her as a "floating cannery." This characterization in no way altered her essential nature as a seagoing fishing vessel.

All fishing vessels which sail on protracted voyages must have some means of preserving the catch. The incident of the method used, whether it be by freezing, salting or canning is of no moment. The fact that the ALASKA QUEEN carried canning equipment aboard her in order to preserve her fish did not alter her status as a vessel in navigation.

2. The appellant was aboard the vessel as a member of her company and crew.

The court below found the plaintiff to be an "industrial worker." Overlooked by the court was the fact that the maritime law relating to workers in the fishing industry is of equal application everywhere. There is no special magic about Alaska waters that renders the status of mariners on their surface any different than those of California or the banks of Nova Scotia. The fact that the appellant was engaged for the most part in butchering the fish brought aboard his ship does not make him a land or shore worker—simply because fish are sometimes butchered and processed on shore installations. By such reasoning the ship's cook would be denied his maritime status because most of the world's cooking is done on land.

The fact that the appellant was employed as a "can-

nery worker" instead of a "deckhand" did not alter his status aboard the vessel ALASKA QUEEN. He should be considered a seaman and crew member just as much as those aboard for the purpose of actually sailing the ALASKA QUEEN. The reason for this is that he was employed on the vessel to assist in the main purpose of the voyage, which was the canning of fish.

A case in point is *The Ocean Spray*, 4 Sawyer 105 (9th Cir. Rep.) Fed. Case 10412. Here a vessel enrolled and licensed for the fisheries sailed from San Francisco on a voyage to Alaska. At Victoria, B. C., 24 Indians were taken aboard to work as sealers. It was held that these Indians were mariners just as well as the American sailors aboard the ship because they were employed to help accomplish the main object of the voyage, which was the taking of seals, and upon their efforts depended the success of the voyage.

Another case in point from this jurisdiction is *The ZR-3*, 18 F.2d 122. This case is almost analogous on its facts with the case now before this Honorable Court. A vessel with salmon packing paraphernalia on board, went to the fishing grounds in Alaska. Here the libelants

"entered into a written contract to go to Pyramid Harbor, during the fishing season, at a stipulated wage, for the season."

The libelants were held to be seamen and crew members, even though they were employed solely to salt and pack fish in barrels aboard the vessel. The court held that they were in that category because they were engaged in furthering the main purpose of the ship's voy-

age, even though they had nothing to do with its navigation, because—

“clearly the main purpose of the voyage was to salt and pack fish.”

Also, the rule has been stated in *Osland v. Star Fish & Oyster Co.*, 107 F.2d 113:

“The term includes all those on board whose labor contributes to the main object in which the vessel is engaged.”

In addition to assisting in the furtherance of the main object of the voyage which was to obtain a cargo of fish, the record is clear that the appellant performed many other tasks which were the ordinary work of a seaman. He cleaned the ship, he painted it, and he handled its lines. At the very moment of his injury he was engaged in the wholly maritime occupation of loading a barge in navigable water. *International Stevedoring Co. v. Haverty*, 272 U.S. 50.

This fact alone placed him beyond the reach of the Territorial compensation laws for any injury sustained while he was so engaged. The court ruled on this very point in *Chappell v. C. D. Johnson Lumber Corp.*, 112 F.Supp. 625 (D. Oregon), as follows:

“In my opinion the loading of a barge of 18 tons or more in navigable water is maritime in nature and injuries of a workman employed on such a barge are likewise maritime, and the rights and liabilities of the parties in connection therewith are clearly within the admiralty jurisdiction and *outside the reach of State compensation laws.*” (Emphasis ours)

The Alaska Compensation Act is of the same rank as a State compensation law.

The Ninth Circuit, in reviewing this case (216 F.2d 873), said the following:

“Here as below appellant, relying on *Davis v. Dept. of Labor & Industries*, 317 U.S. 249, contends that the operation in which he was injured falls within the twilight zone between State and Federal jurisdiction. We are not able to agree. The facts as submitted disclose a typical situation of maritime injury.”

The court below was evidently influenced by its finding that the appellant was not directly supervised by the master of the vessel (R. 17). This fact should have no significance whatsoever, because all who live and work aboard a ship in navigation are subject to the authority of its captain. The test of direct supervision on modern type vessels is no test at all, for necessity requires that all of them be departmentalized. The firemen, wipers, oilers and water-tenders are not under the direct supervision of the master but are supervised by the chief engineer. The cooks and stewards are likewise under the direction of the chief steward. To say that a person is not a member of a ship's company because he is not in the ship's deck department where the captain deals with him directly, constitutes the raising of an unrecognized distinction.

Issue has also been made of the fact that the ALASKA QUEEN was moored along the shore and drew a supply of water from the land. Neither fact should be accorded any weight. All vessels must of necessity tie up to the shore from time to time. All their supplies must come from the land. A vessel in navigation does not lose its identity because it ties up at a dock. Neither does it be-

come a land object because it takes aboard fresh water from the shore rather than salt water from the sea.

A case in point is *Jeffrey v. Henderson Bros.*, 193 F. 2d 589. There coal miners were employed aboard a boat to wash coal. The coal came from two refuse gob piles, which came from mines in the vicinity, and had been placed along the river bank. The vessel tied to the bank and the men washed and cleaned the coal. They were held to be crew members. The court quoted:

“It is now well settled that all persons employed on a vessel to assist in the main purpose in which she is engaged are entitled to a lien for wages. So it has been held that clerks, carpenters, chambermaids, cooks, stewards and waiters are so entitled. *Dest. Shipp & Adm.*, Sec. 173, and cases there cited. The statute above referred to which declares that persons employed ‘in any capacity’ upon vessels shall be deemed ‘seamen’ seems conclusive upon this point.”

3. The appellant is entitled to the same protection as the other members of the ship’s company.

All the persons who lived and worked aboard the ALASKA QUEEN during the 1953 fishing voyage were exposed to the same hazards and perils. The court below mistakenly attempted to distinguish between members of the ship’s company solely on the basis of their duties aboard the vessel. The protection afforded by the Jones Act, 46 U.S.C., §688, extends equally to every member of the ship’s company.

The fact that a deck-hand stood watch while the appellant butchered or stowed cases of salmon is no cause for discriminating against the one who did the hard-

est, most menial work. Literally they were in the same boat together. A disaster striking the ship such as a fire or explosion would not pick and choose between them on such an arbitrary basis. This exact point was ruled on in *Wilkes, et al., v. Mississippi River Sand and Gravel Co.*, 202 F.2d 383, certiorari denied, 346 U.S. 817, 98 L.Ed. 344, 74 S.Ct. 29. Here the court said:

“ * * * In our judgment, an employer who hires men to work on the water on vessels engaged in navigation and permits them to have such a permanent connection with the vessel as to expose them to the same hazards of marine service as those shared by all aboard should not be permitted, by merely restricting their duties or by adopting particular nomenclature as descriptive of their tasks, to limit his liability to such employees, in the event of disability or death alleged to have been caused by the negligence of the employer, to the extent prescribed by the Longshoremen's Act.”

CONCLUSION

Upon the basis of the authorities cited herein we ask that the Court find that the appellant is entitled to maintain his suit under the Jones Act, 46 U.S.C.A., §688, that the decree of the District Court be reversed and the suit remanded to the court from which it arose with instructions for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

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By PHILIP J. POTH

Attorneys for Appellant.

United States Court of Appeals
For the Ninth Circuit

SANTOS CUADRA, *Appellant*,

vs.

QUEEN FISHERIES, INC., a corporation, and E. H.
BENDIKSEN, doing business as E. H. BENDIKSEN Co.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

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United States Court of Appeals
For the Ninth Circuit

SANTOS CUADRA,

Appellant,

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No. 14969

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

JURISDICTION

The appellant contends that jurisdiction is granted by the provisions of Title 46 U.S.C.A. Sec. 688. This the appellees deny.

COUNTER-STATEMENT OF THE CASE

The appellees herein, Queen Fisheries, Inc., and E. H. Bendiksen Co., are engaged in the business of canning salmon, said canning operations being conducted at Bristol Bay, Territory of Alaska.

The canning equipment or cannery line is located aboard their vessel, the ALASKA QUEEN, a vessel of some 297 tons.

Each and every season the ALASKA QUEEN is sailed from the Seattle area to Bristol Bay by its regular

crew. The crew of said vessel consists of a skipper, the mate, two engineers, three deckhands and a cook (R. 158). The navigation of said vessel to and from the cannery operation at Bristol Bay is under the supervision and control of the captain of the vessel (R. 106). After said vessel arrives in the Bristol Bay area, it is moored alongside a dock adjacent to the appellees' warehouse, and said vessel is anchored fore and aft.

After the arrival of the vessel in the Bristol Bay area, the canning operation is under the supervision and control of the appellee, E. H. Bendiksen. A separate crew, consisting of natives and non-residents, operates the canning operation as a separate crew (R. 158). The appellant is a member of this group.

The appellant herein, Santos Cuadra, was employed by the appellee, Bendiksen, as a fish butcher and part of the Filipino canning crew. After the vessel arrives in the Bristol Bay area, the non-resident Filipino cannery workers are transported by air from Seattle to the cannery. At the conclusion of the canning season, the Filipino cannery crew are returned to Seattle by air (R. 165). The regular crew of the vessel returns the ship to the Seattle area after the conclusion of the canning season (R. 156).

The crew of the vessel is paid by the month, and also they are paid based upon a percentage of the pack for the season (R. 159-160). The non-resident cannery workers are paid pursuant to the cannery workers' union contract and on a seasonal guarantee basis (R. 159).

The salmon canning operation is no different than any other canning operation in the Bristol Bay area,

with the exception that the canning equipment itself is located on a vessel that floats (R. 41, 165).

In order to operate the cannery, the vessel must tie up alongside the beach, inasmuch as said cannery requires a supply of fresh water from the beach to operate the boilers and conduct the canning operation. In addition, warehousing facilities on the beach are necessary for the storing and casing of the canned salmon (R. 153-154-161-162). In effect, said floating cannery must become a stationary adjunct to the shore in order to operate as a cannery.

The cannery workers have a different method of pay from the regular members of the crew (R. 159-160). They have separate supervision from the members of the crew (R. 160). There are separate quarters aboard the vessel and on shore for the Filipino cannery workers (R. 160); they are hired differently and have different wage contracts from the regular crew members of the vessel. There is no interchange among the cannery crew and the crew that operates the vessel (R. 164), and the Filipino cannery workers are employed merely for the canning operations at Bristol Bay, which generally last approximately one month (R. 158).

ARGUMENT IN SUPPORT OF JUDGMENT

The specification of assigned errors is directed solely to the conclusion of law, as to whether or not these Filipino cannery workers, and the appellant in particular, are members of the crew within the meaning of the Jones Act, or whether or not they are industrial workers whose claims come within the jurisdiction of th

Alaska Workmen's Compensation Act, Section 43-3-1 of the Alaska Code of 1949.

It is the contention of these appellees that the operation of the appellees presents a function which is actually dual in nature.

One operation consists in sailing the vessel, ALASKA QUEEN to the Bristol Bay area for canning operations each and every summer, and the return of said vessel to its home port of Seattle at the conclusion of the season.

The second part of the operations, *viz.*, the industrial operation of canning salmon, begins only when the voyage to the Bristol Bay area ends, and when the vessel comes to rest permanently attached to the shore area adjacent to the warehouse in Bristol Bay. Then and then only does the appellant herein involved begin to perform his labors on behalf of the appellees. This labor, which is performed while said vessel is at rest and permanently affixed to the shore, is essentially local in character and has no relation whatsoever to the navigation of said vessel. The work of the appellant herein is confined primarily to working as a fish butcher in the cannery operations and the maintenance of the cannery deck for said operations. The vessel itself must tie up to the shore in order to have available the water for washing the fish and operating the boilers (R. 162). Also it cannot operate without the warehousing facilities on the beach, inasmuch as warehousing facilities on said vessel are not available for the purpose of casing and storing the salmon as it is canned (R. 162).

The loading of the salmon from the warehouse into barges is typical of any other cannery operation in the

Alaska area (R. 127-128). The fact that the Filipino cannery workers eat aboard the vessel is not material. Due to the nature of the operation, there are no facilities to eat ashore, so therefore food must be supplied on the vessel (R. 160). The fact that the appellant lived aboard is not conclusive either, inasmuch as part of the cannery crew live aboard and the others live ashore where space is available (R. 103). At the time of the alleged injury the appellant was working in a barge with other Filipinos, and also with a number of the native Alaskan Indians who were employed by the appellees to assist in the canning operations. The natives also work with the Filipino workers on the cannery deck and also in the warehouse (R. 40, 41, 97).

It is the position of the appellees herein that there is no question but that the loading of the salmon in the barge is merely an incident of the canning process itself, and certainly there is nothing more local to Alaska than the canned salmon industry.

It is the contention of these appellees that at the time of the alleged injury, the appellant herein was engaged in an enterprise which is a purely local matter, regulation of which by the Territory of Alaska would work no material prejudice to the General Maritime Law, and is not concerned with commerce or navigation, and therefore the Alaska Compensation Act can undoubtedly provide compensation.

It is well settled that if an injury occurs in navigable waters in the performance of a maritime contract, the case falls within the exclusive jurisdiction of Admiralty, unless (a) *the contract is of mere local concern*; (b)

its performance has no direct effect upon navigation or commerce, and (c) the application of the local statute would not necessarily work material prejudice to any characteristic feature of the General Maritime Law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

This is the doctrine laid down in *Southern Pacific v. Jensen*, 244 U.S. 205. This doctrine has been reinforced and expanded in *Miller's Indemnity Underwriters v. Braud*, 70 U.S. 59. In that particular case a diver working off a floating barge had submerged himself in navigable waters "for the purpose of sawing off of timbers of an abandoned set of ways once used for launching ships and which had become an obstruction to navigation" (p. 63).

In that case the locality was Maritime, the diver's employment in working beneath the surface of navigable waters was Maritime, a maritime tort was committed. Nevertheless, it was held that the nature of the enterprise in which he was engaged was a matter of mere local concern because he was engaged in dismantling a fixed local structure which, incidentally, had a closer relation to navigation and maritime commerce than the canned salmon industry. There is discussed in the *Braud* case the previous Supreme Court case of *Grant Smith-Porter Company v. Rohde*, 257 U.S. 469, in which it had been held that a carpenter injured while at work upon an uncompleted vessel lying in navigable waters within the State of Oregon was engaged in a non-maritime contract, having no direct relation to navigation or commerce, and therefore the exclusive remedy prescribed by the Oregon Workmen's Compens-

sation Act precluded him from recovering damages for his injuries except under said Act.

In *Sultan Railway & Timber Co. v. Dept. of Labor and Industries*, 277 U.S. 135 (affirming 141 Wash. 172), there was involved the validity of an order requiring payments into the State Workmen's Compensation fund of assessments based on the wages of certain employees engaged in log booming work on the Snohomish River. It was there stated:

“The plaintiff in one suit is conducting logging operations a part of which consists in putting saw logs into booms after they have been thrown into a navigable river, so that they conveniently may be towed elsewhere for sale. The men are employed in the booming work. The plaintiff in the other suit conducts a sawmill on the bank of a navigable river. Logs are towed in booms to a point adjacent to the mill and then anchored. The booms afterward are taken apart and the logs are guided to a conveyor extending into the river and then drawn into the mill for sawing. The men are employed in taking apart the booms and guiding the logs to the conveyor. In both instances the place of work is on navigable water—in one it is done before actual transportation begins, and in the other after the transportation is completed.

“It is settled by our decisions that where the employment, although maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties as between themselves may be regulated by local rules which do not work material prejudice to the characteristic features of the General Maritime Law or interfere with its uniformity. Citing *Grant Smith-Porter Co. v.*

Rohde, supra; Miller's Indemnity Underwriters v. Braud, supra, and Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467."

In other words, since the Alaska Compensation Act applies to all employment which is within the legislative jurisdiction of said territory, said territorial law includes the entire field not excluded from state or territorial jurisdiction by the "Jensen line of decision." Consequently, the sole test in this case is whether the facts fall under the "Jensen line of decision."

The "Jensen line of decision" lays down the line of demarcation between exclusive federal maritime jurisdiction and state jurisdiction, definitely leaving within the field of state or territorial legislative jurisdiction all maritime matters of "merely local concern" which do not interfere with the "proper harmony and uniformity of the General Maritime Law." As pointed out in the cases discussed above, an employee engaged in an enterprise of dismantling booms or working on submerged sets of ways is, even though in the water or upon a barge on the water, engaged in a purely local enterprise, a "merely local matter" to which the territorial law applies.

In the instant case, the appellees herein are, of course, engaged in the business of canning salmon. That is the only purpose for which the vessel is moved from Seattle to the Bristol Bay area. The moving of the canned salmon from the warehouse on the beach into a barge alongside the ALASKA QUEEN for transportation into the stream, although a contemplated movement on navigable waters of Bristol Bay, is not engaging in commerce in such a sense so as to effect the "proper

harmony or uniformity of the General Maritime Law in its international and interstate relations." The use of the barge is purely incidental and part of the canning operation.

Also we feel that this is the theory announced by this court in *Alaska Packers Association v. Marshall*, found at 95 F.(2d) 279, 281, where this court says:

"When the details of the contract of employment are considered, the local character of this gathering of the cannery's raw materials is clearly seen as a mere incident to the canning process."

Also, the case of *Alaska Industrial Board v. Alaska Packers Association*, 186 F.(2d) 1015, is clearly distinguishable. In that particular case the claimant's injuries were from a purely maritime cause, the result of a straining of his back in carrying a sack of coal from the ship's bow to the ship's galley. "The towboat had been and was to be used by the packers in towing fishing boats and their fishermen from the packers' stationary receiving station at Nakanek on Kvichak, an inlet of Bristol Bay, Alaska, some twenty miles or more out to the fishing grounds in Bristol Bay, and later at the end of the fishing day returning to tow the boat, the fishermen and their catch back to the receiving station."

In the instant case, Cuadra was not employed by appellees for the purpose of *operating the vessel* in navigable waters. He was employed solely to assist in the shore based operation of canning the salmon. The record is clear that the appellant herein, who is 53 years of age, during all of his working career in this country has been employed as a cannery worker, and that was the only purpose of his hiring out with the appellees

herein. The record is also abundantly clear that his duties were no different from any other regularly employed cannery worker in the Bristol Bay area, with the exception of the fact that the cannery itself floats. Compare this court's decision in *Puget Sound Freight Lines, et al., v. Marshall*, 125 F.(2d) 876.

For that reason the appellees herein provided coverage for this cannery worker under the Alaska Compensation Act, and after the reported injury, said claim was turned over to the Alaska Industrial Board, and said man was furnished medical, hospitalization and compensation (R. 165-166-167), said appellant being merely a cannery worker engaged in duties that are common to all employees engaged in such work in the Territory of Alaska.

CONCLUSION

The appellees respectfully submit that the judgment of the trial court should be affirmed, on the grounds and for the reason that the appellant is not a member of the crew within the meaning of the Jones Act.

SWEET, WOLF & MERRICK,
H. J. MERRICK,
Attorneys for Appellees.

